No. 75-3821

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

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No.

FEDERAL ENERGY ADMINISTRATION, ET AL.,
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v.

ALGONQUIN SNG, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Energy Administration, the Secretary of the Treasury, the Administrator of the Federal Energy Administration, and the Treasurer of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-32a) and the opinion of the district court (App. C, *infra*, pp. 37a-49a) are not reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 33a-36a) were entered on August 11, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 232(b) of the Trade Expansion Act of 1962 authorizes the President—upon a finding that oil is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security—to adjust the imports of oil by imposing a system of license fees on such imports.

STATUTE INVOLVED

Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877, 19 U.S.C. 1862(b), as amended by Section 127(d) of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1993, provides:

> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

STATEMENT

1. Section 232(b) of the Trade Expansion Act of 1962 gives the President authority to adjust the imports of any article in the interest of national security. It provides that if, after "an appropriate investigation," the Secretary of the Treasury "finds that

[an] article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President [unless he disagrees with the Secretary's finding] shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security * * *."[1]

The substance of the provision was originally enacted as part of the Trade Agreements Extension Act of 1955, 69 Stat. 162. It was invoked by President Eisenhower in 1959 to establish the Mandatory Oil Import Program, a system of volumetric restrictions or quotas on imports of petroleum and petroleum products (Pres. Proc. 3279, 24 Fed. Reg. 1781). The program was designed to reduce this Nation's dependence on foreign oil, which the President determined was being imported in such quantities and at such low costs as to threaten to impair the national

[1] Section 232(c) of the Act enumerates some of the "relevant factors" to be considered by the Secretary and the President in determining whether imports of an article threaten to impair national security. Those factors include "domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, * * * the requirements of growth of such industries * * * including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries * * *." That Section also provides that "the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security * * *."

security by impeding the development of domestic production and refinery capacity (*ibid.*; J.A. 128-129).[2]

The Mandatory Oil Import Program did not fully achieve its objective. Domestic consumption continued to increase more rapidly than domestic production, and succeeding Presidents amended the program by increasing the import quotas to satisfy the growing domestic demand (J.A. 129).

In April 1973, President Nixon amended the program by suspending existing tariffs on oil imports and providing for "a gradual transition from the existing quota method of adjusting imports" to "a system of fees" to be paid by oil importers for licenses authorizing them to import specified amounts of petroleum and petroleum products (Pres. Proc. 4210, 38 Fed. Reg. 9645, 9646). The new program was designed to provide a long-range economic incentive to increase domestic production and refinery capacity while allowing greater levels of imports than under the prior program (J.A. 130). It established a gradually increasing schedule of license fees, which by the end of 1975 were to amount to $0.21 per barrel for crude oil and $0.63 per barrel for most petroleum products. It also established a gradually decreasing level of imports to which the license fees would not be applicable during the transition

[2] "J.A." refers to the joint appendix in the court of appeals, a copy of which we have lodged with the Clerk of this Court.

period; by 1980, license fees were to be applicable to all oil imports covered by the program.

2. On January 4, 1975, the Secretary of the Treasury initiated an investigation under Section 232 (b) to determine the current effects on the national security of imports of petroleum and petroleum products (J.A. 66). The investigation revealed that our dangerously increasing dependence on foreign petroleum posed a grave threat to the Nation's military security and economic welfare, a threat that had been underscored by the oil embargo imposed in September 1973 by the Organization of Petroleum Exporting Countries and the subsequent quadrupling of the price of imported oil (J.A. 42-43). The Secretary concluded that a sudden recurrence of an embargo or other similar interruption "would have a prompt substantial impact upon our economic well-being" and that, "in the event of a world-wide political or military crisis" resulting in "a more complete interruption of the flow of imported petroleum," the total domestic production "might well be insufficient to supply adequately a war-time economy" (J.A. 43).

The Secretary accordingly found that oil was being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security, and he recommended to the President that "appropriate action be taken to reduce imports" in order "to promote a lessened reliance upon such imports, to reduce the payments outflow and to create incentives for the use of alternative sources of energy" (J.A. 44).

On January 23, 1975, the President issued Proclamation 4341 further modifying the method of adjusting imports of crude oil and oil products (40 Fed. Reg. 3965; J.A. 35-41). The President declared that he agreed with the finding of the Secretary of the Treasury and that he "judge[d] it necessary and consistent with the national security to further discourage importation [of oil] into the United States" and to provide further incentives for increasing domestic production and refinery capacity and for developing other sources of energy (40 Fed. Reg. 3966; J.A. 36).

Recognizing that "the seriousness of the situation demanded immediate action" (J.A. 190) to reduce the Nation's dependence upon foreign oil, the President modified the existing license fee system, imposed a supplemental fee on all oil imports, and reinstated the oil tariffs that had been suspended in 1973. The proclamation increased the existing "first-tier" license fees to their maximum levels of $0.21 and $0.63 for imports in excess of the amounts that were excused from license fees under the existing program. In addition, the proclamation imposed on all imported oil, whether or not subject to the first-tier fees, a supplemental fee of $1.00 per barrel for oil entering on or after February 1, 1975, rising to $2.00 per barrel on March 1, 1975, and to $3.00 per barrel on April 1, 1975.[3]

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[3] The proclamation authorized the Administrator of the Federal Energy Administration to reduce the fee payable for imports of certain refined products by an amount increas-

The Federal Energy Administration thereafter amended its oil import regulations to implement the provisions of Proclamation 4341 (40 Fed. Reg. 4771-4776; J.A. 270-275).

3. On January 27, 1975, respondents [4] brought actions in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the imposition of oil import license fees (J.A. 6-29, 303-315). The complaints alleged that imposition of the fees is beyond the President's constitutional and statutory authority, that proper procedures were not followed, and that no proper environmental impact statement was prepared.

On respondents' motions for a preliminary injunction, the district court ruled that Section 232(b) of the Trade Expansion Act of 1962 "is a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security"

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ing to as much as $1.80 per barrel by April 1, 1975 (40 Fed. Reg. 3968).

The scheduled increases in the supplemental fee to $2.00 and $3.00 per barrel were subsequently deferred. See Pres. Proc. 4355, 40 Fed. Reg. 10437; Pres. Proc. 4370, 40 Fed. Reg. 19421. The $2.00 fee was later made effective as of June 1, 1975. Pres. Proc. 4377, 40 Fed. Reg. 23429. The $3.00 fee has not been imposed.

[4] One set of respondents is composed of 10 utility companies that sell gas or electricity in the northeastern United States and one member of Congress. The other set is composed of nine states and the governors of eight of those states (App. A, *infra*, p. 8a).

(App. C, *infra*, p. 44a). "[T]he license fee program," the court stated, "is one of a number of possible actions covered in the non-defined phrase 'to adjust imports,'" and the program was properly instituted "for the protection of national security" (*id.* at 42a).[5]

The court also found that all the procedural steps required by Section 232(b) were followed (*id.* at 44a-45a) and that, "in view of the emergency nature of the problem and the need for prompt action" (*id.* at 47a), preparation of an environmental impact statement in advance of the proclamation was not required under the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321, *et seq.* (*id.* at 46a-47a).

Accordingly, since "plaintiffs have not made a strong showing that it is likely that they will prevail on the merits," and since "any interference by way of injunctive relief would be inconsistent with the public interest," the district court denied the motion (*id.* at 48a).[6]

4. Respondents' appeals were consolidated in the court of appeals with their petitions for review of the Federal Energy Administration's regulations,[7] in

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[5] The court noted that respondents did not challenge "the President's determination that his program is required in the interests of national security" (App. C, *infra*, p. 39a).

[6] The district court thereafter ordered that its findings, conclusions, and order would constitute its final judgment in the cases (J.A. 298).

[7] The petitions for review were filed pursuant to Section 7 (i) (2) (A) of the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 102.

which they presented essentially the same contentions that they raised in their complaints in the district court. The court of appeals, with one judge dissenting, reversed the judgment of the district court and remanded the cases with instructions to grant appropriate relief to respondents; it also set aside the Federal Energy Administration's regulations (App. A, *infra*, pp. 1a-32a).[8]

The court of appeals reasoned that, although Section 232(b) authorizes the President, in the interest of national security, to "take such action * * * as he deems necessary to adjust the imports of [an] article," to give the statute the broad interpretation that its terms suggest "would be an anomalous departure" from "the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs" (*id.* at 12a). The court inferred from the legislative history that Congress intended, when it authorized the President to "adjust the imports of [an] article," to permit the use only of "direct controls" (*id.* at 16a), such as quotas, and to exclude the use of "indirect controls" (*id.* at 22a), such as license fees (*id.* at 27a-28a). The court therefore concluded that "the two-tier program of license fees initiated by Presidents Nixon and Ford are beyond the scope of their [Section 232(b)] authority and cannot stand" (*ibid.*).[9]

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[8] The court of appeals stayed the issuance of its mandate to and including September 15, 1975.

[9] The majority found it unnecessary to decide whether the statute, if more broadly interpreted, would be an unconstitutional delegation (App. A, *infra*, p. 28a). It also did not reach respondents' procedural challenges to the proclamation and the implementing FEA regulations (*ibid.*).

Judge Robb dissented, observing (*id.* at 30a-31a):

> The statute authorizes the President to "take such action . . . as he deems necessary to adjust . . . imports", without purporting to limit in any way the kind of action available to the President. Admittedly, quotas have a direct effect on imports, whereas license fees have an indirect effect. But both affect imports, and I cannot see how the plain and broad language of section 232(b) can be read to limit the President to the use of one or the other.

REASONS FOR GRANTING THE WRIT

1. The scope of the President's authority to take appropriate action to adjust petroleum imports in the interest of national security is a question of fundamental and urgent importance to the economic well-being of the Nation and should be resolved by this Court. By interpreting Section 232(b) as authorizing only the use of "direct" or quantitative controls, the decision of the court of appeals severely restricts the range of actions that the President may take to eliminate a threatened impairment of the national security. In the case of petroleum imports, the decision limits the President to the use of quotas, which have proved to be unsuitable and could cause artificial shortages and dislocations, and bars the imposition of license fees, which the President has de-

termined to be "necessary and consistent with the national security" (J.A. 36).

The decision thus impairs the President's capacity to take effective action, in the court of appeals' words, "to extricate this country from its increasingly dangerous dependence on foreign petroleum" (App. A, *infra*, p. 10a) and thereby to avoid a "grave crisis" implicating "nothing less than our country's economic freedom and survival" (*id.* at 28a). In this "matter of primary national importance" (*id.* at 10a; App. C, *infra*, pp. 40a-41a), review by this Court is warranted.

2. The decision of the court of appeals rests upon an incorrect analysis of congressional intent. The legislative history of Section 232(b) compels, rather than undercuts, an interpretation that gives full effect to the plain meaning of the statutory language.

As originally enacted in 1955, the statute authorized the President, upon a proper finding, to "take such action as he deems necessary to adjust the imports of [an] article to a level that will not threaten to impair the national security" (69 Stat. 166). The report of the Senate Committee on Finance emphasized that the provision was intended to give the President broad authority to "take whatever action is necessary to adjust imports" to a satisfactory level. S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). Senator Millikin, the ranking minority member of the committee and a principal author of the bill, stated on the floor that the provision authorizes the President to "use tariffs, quotas, import taxes, or

other methods of import restriction"—in short, "whatever action he deems necessary to adjust imports" (101 Cong. Rec. 5299 (1955)).[10]

After the provision was enacted and before it was reenacted in 1958, the Office of Defense Mobilization, part of the Executive Office of the President, submitted a report to the Subcommittee on Foreign

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[10] The court of appeals failed to give due weight to Senator Millikin's remarks. That Senator Millikin was a "representative of Colorado which was a major supplier of coal and petroleum" (App. A, *infra*, p. 17a) does not "blur [the] probative value" (*ibid.*) of his statement as a guide to legislative intent. It is not uncommon that a bill's author represents a state with a special interest in the legislation. While that special interest may explain the legislator's role in drafting the legislation, it does not diminish the relevance of his understanding of the bill's provisions.

Senator Millikin's understanding, moreover, was confirmed during debate by other Senators. Senator Bennett stated that the provision would put at the President's "command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry" (101 Cong. Rec. 5588 (1955)). See also 101 Cong. Rec. 5298 (1955) (remarks of Senator Barkley).

The court of appeals incorrectly stated that Senator Millikin's remarks were "inconsistent" with the other legislative history (App. A, *infra*, p. 18a). The court relied primarily upon the comment made during floor debate by Senator Byrd, chairman of the Senate Finance Committee, that the provision "simply leaves to the President the power, in his discretion, to decide whether to impose a quota or to reduce the imports" (101 Cong. Rec. 5297 (1955)). That comment does not support the court of appeals' inference that "the intended scope of the [President's] action was limited to direct controls" (App. A, *infra*, p. 16a). To the contrary, Senator Byrd's phrase—"to impose a quota *or* to reduce the imports"—reinforces Senator Millikin's more explicit description of the controls other than quotas that would be available to the President.

Trade Policy of the House Ways and Means Committee. The report stated that, while the provision "does not prescribe the specific actions which the President would be authorized to take, congressional discussion of the legislation indicated that the imposition of new or increased tariff duties or imports *and* the establishment of import quotas were authorized by the language adopted." [11] Another statement by that Office, submitted during hearings before the subcommittee, reiterated that, under the existing law, "only the President is authorized to determine that there is a threat [to the national security] and what means should be employed to meet it." [12]

Congressman Mills, then chairman of the subcommittee, stated on the floor of the House that "[t]he committee looked very carefully into the national security provisions of existing law" (104 Cong. Rec. 10542 (1958)). The committee recommended, and Congress enacted, certain procedural amendments to those provisions (see 72 Stat. 678-679). Although aware of the President's view that the existing law authorized the imposition of different types of controls to adjust imports, including tariffs as well as quotas, the committee did not recommend, and Con-

[11] *Foreign Trade Policy, Compendium of Papers on United States Foreign Trade Policy Collected by the Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means*, p. 643 (1958) (emphasis added).

[12] Hearings on Foreign Trade Policy before the Subcommittee on Foreign Trade Policy of the House Committee on Ways and Means, 85th Cong., 1st Sess. 399 (December 9, 1957).

gress did not enact, any change in what Congressman Mills referred to as "the broad delegation of authority" (104 Cong. Rec. 10542 (1958)) to the President to select the means of accomplishing the necessary adjustment.

That delegation of authority was carried forward without substantive change as Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877,[13] and

[13] Congress rejected in 1962 a provision in a different section of the bill that would have given the President authority, "when he finds it in the national interest," to establish or increase a duty on any article or to impose any other import restriction that he finds necessary (108 Cong. Rec. 19875 (1962); App. A, *infra*, pp. 19a-20a). The court of appeals inferred, from the proposal's introduction, that "Congress believed that no other provision of the Act conferred that authority," and, from the proposal's rejection, that "it did not desire to confer this authority and discretion upon the President" (*id.* at 21a). Even assuming the correctness of those inferences, neither is "devastating to the Government's position" (*ibid.*). Contrary to the court of appeals' assumption, the rejected provision would not have given the President "the same authority he claims derives implicitly from [Section 232(b)]" (*id.* at 20a). Unlike the rejected proposal, which would indeed have been an expansive delegation of authority to the President to impose import controls in the "national interest," Section 232 provides for an investigation, consultation, and recommendation to the President, requires a finding that imports threaten to impair the "national security" (in light of the considerations set forth in Section 232(c), see n. 1, *supra*), and limits any adjustment of imports under the section to what is necessary to eliminate the threat to the national security. That Congress rejected in 1962 a far broader delegation of authority over duties and other import restrictions does not mean that the terms of Section 232(b) should be read to exclude the President's use of license fees as a method of adjusting imports.

was reenacted with additional procedural and technical amendments by Section 127(d) of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1993."

The national security provision today, no less than in 1955, means just what it says. The President may take "whatever action is necessary to adjust imports" (S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955)), including the imposition of quotas, tariffs, fees, and other controls. Whether the method he selects has a "direct" or "indirect" effect on imports is immaterial under the statute.

3. The contrary observation of the court of appeals notwithstanding, this reading of Section 232(b)

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[14] In 1970, the President's Cabinet Task Force on Oil Import Control advised the President that Section 232(b) gave him authority to increase tariffs, and recommended that import quotas on oil be replaced with a system of tariff restrictions. *The Oil Import Question*, pp. 90, 131 (1970). The House thereafter passed an amendment to Section 232, designed to prohibit "any adjustment of imports * * * by the imposition or increase of duty or of any fee or charge having the effect of a duty." H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 119 (1970). The amendment was reported out of the Senate Committee on Finance (S. Rep. No. 91-1431, 91st Cong., 2d Sess. 36 (1970)), but was deleted on the floor of the Senate (116 Cong. Rec. 43625, 43646 (1970)) and was not enacted.

No such amendment was adopted at the time of the 1974 Act, although President Nixon's import license fee system was implemented in April 1973. The report of the conference committee reaffirmed that, under the provision as amended, the President may "take such action, and for such time, as he deems necessary, to adjust imports so as to prevent impairment of the national security." H.R. Conf. Rep. No. 93-1644, 93d Cong., 2d Sess. 29 (1974). See also S. Rep. No. 93-1298, 93d Cong., 2d Sess. 96-97 (1974).

does not make it "an anomalous departure" (App. A, *infra*, p. 12a) from the legislative pattern in the area of foreign trade and tariffs. For example, Section 351(a)(1) of the same Act, 19 U.S.C. 1981(a)(1), confers on the President analogous authority. Upon a finding by the Tariff Commission that an article is being imported in such increased quantities as to threaten to injure a competitive domestic industry, "the President may proclaim such increase in, or imposition of, any duty or other import restriction on the article * * * as he determines to be necessary to prevent or remedy serious injury to such industry." This so-called "escape clause," like the national security provision of Section 232(b), applies to any imported article and gives the President full authority to choose the method of accomplishing the statutory objective.[15]

Moreover, the contrast between the broad delegation of authority in Section 232(b) and the narrow delegations contained in some other statutes is not a reason for a judicial narrowing of Section 232(b). To the contrary, the contrast shows that Congress knew how to confine delegations closely when it so desired and points to the conclusion that Section 232(b) was intended to confer the authority the President exercised.

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[15] A similar "escape clause" was adopted as Sections 201 through 203 of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 2011-2018.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Aug. 11, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 75-1202

ALGONQUIN SNG, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

No. 75-1206

COMMONWEALTH OF MASSACHUSETTS AND MICHAEL S. DUKAKIS, GOVERNOR, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

Petitions for Review of an Order of the Federal Energy Administration

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No. 75-1281

COMMONWEALTH OF MASSACHUSETTS, ET AL., APPELLANTS

v.

WILLIAM E. SIMON, ET AL.
(D.C. Civil 75-0129)

No. 75-1282

ALGONQUIN SNG, INC., ET AL., APPELLANTS

v.

WILLIAM E. SIMON, ET AL.

(D.C. Civil Action 75-0130)

Appeals from the United States District Court
for the District of Columbia

Argued July 14, 1975

Decided August 11, 1975

[Judgment entered this date]

Harold B. Dondis, of the bar of the Supreme Judicial Court of Massachusetts, *pro hac vice*, by special leave of court, with whom *William R. Connole*, was on the brief for petitioners in No. 75-1202 and 75-1282. *Ernest C. Bayard, III*, also entered an appearance for all petitioners.

Francis X. Bellotti, Attorney General of Massachusetts, with whom *James S. Hostetler*, was on the brief, for petitioners in Nos. 75-1206 and 75-1282. *Albert D. Sturterant* entered an appearance for petitioners in No. 75-1281. *William R. Connole*, entered an appearance for petitioners in No. 75-1206 and 75-1281.

Irwin Goldbloom, Deputy Assistant Attorney General, with whom *Rex E. Lee*, Assistant Attorney General and *Barrie L. Goldstein*, Attorney, Department of Justice, were on the brief, for respondents.

Before: TAMM, LEVENTHAL and ROBB, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* Tamm.

Dissenting opinion filed by *Circuit Judge* Robb.

TAMM, *Circuit Judge*: In these consolidated appeals, plaintiffs-appellants Commonwealth of Massachusetts, *et al.* seek to overturn the imposition of license fees for importation of oil and petroleum products as required by certain Proclamations of President Ford and former President Nixon and as implemented through regulations adopted by the Federal Energy Administration (FEA). Appellants assert that the challenged presidential actions were beyond their claimed statutory authority under 19 U.S.C. § 1862(b) (1970) and that the Proclamation and regulations in question were promulgated without adherence to certain procedural prerequisites. We told today that the executive is without substantive authority to impose license fees of the magnitude at issue here.

I. FACTUAL BACKGROUND

The operative statute, 19 U.S.C. § 1862(b), (1970), authorizes the President to

> take such action, and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives so that . . . imports [of such article] will not so threaten to impair the national security.

A. *The Eisenhower and Nixon Programs*

The program under which the challenged fees were imposed was initiated in 1959 by President Eisenhower under his section 1862(b) authority in Presidential Proclamation 3279. *See* 19 U.S.C. § 1862 note. The so-called Mandatory Oil Import Program (MOIP) was based on a determination that foreign petroleum [1] was being imported into the United States in such quantities and at such low costs as to threaten to impair national security by inhibiting the development of domestic production and refinery capacity. Proclamation 3279 required each petroleum importer to secure a license, divided the country into five districts, and established an import quota for each district. The Secretary of Interior was directed to allocate the quota among individuals with an existing refining capacity or import history. Although subsequently amended twenty-five times,[2] the MOIP quota system remained in effect from 1959 to May 1, 1973.

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[1] The term "petroleum" as used herein refers to both crude oil, unfinished oils (which encompasses a variety of refined petroleum products) and finished products.

[2] *See United States Tariff Commission, World Oil Developments and U.S. Oil Import Policies*, T.C. Publication 632 at 46-48 (1973) (hereinafter *Tariff Commission Report*). Many of these modifications, especially in the period 1970-73, were necessary to meet the gap between domestic supply and demand. As such, MOIP failed to accomplish its stated objective of reducing dependence on foreign oil. *See generally id.* at 42-70.

Proclamation 4210, effective May 1, 1973, announced by former President Nixon, inaugurated a radical change in the system. *See* 19 U.S.C.A. § 1862 annot.; 38 Fed. Reg. 10725 (1973). Under this new plan, the quota system was abolished. Instead, the issuance of import licenses was conditioned on a schedule of license fees to be phased in during the period May 1, 1973 through November 1, 1975.[3] The impact of the fee system was tempered by a provision that allowed fee-free imports up to a person's previous quota allocation; these fee-free allocations were to be phased out gradually until 1980, when license fees would be required on all imports covered under the Proclamation. Finally, Proclamation 4210 abolished the tariff on petroleum. Proc. 4210 § 16.

B. *The Ford Plan*

Section 1862(b) authorizes presidential action only after receipt of advice from the Secretary of the Treasury that an article is being imported in quantities or under circumstances as to threaten to impair the national security. The Secretary may not transmit such advice to the President under this section until he has made an appropriate investigation to determine the effects on national security, during which he must consult with the Secretaries of De-

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[3] The fees were to increase during that period from 10.5 to 21 cents/bbl for crude oil, from 52 to 63 cents/bbl for motor gasoline and from 15 to 63 cents/bbl for finished products and unfinished oils. Proc. 4210 § 3(a).

fense and Commerce and other appropriate officers.[4] Finally, the Trade Act of 1974, 88 Stat. 1978, effective January 3, 1975, amended section 1862(b) to include the provision that "[t]he Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation."

On January 4, 1975, the day after the amendment became effective, Secretary of the Treasury, William E. Simon, undertook an investigation to determine whether the current level of petroleum imports threatened national security. In a letter delegating the investigation to Assistant Secretary David R. MacDonald, Secretary Simon stated:

> In my judgment, national security interests require that the procedures requiring public notice and opportunity for public comment or hearings . . . not be followed in this case. I further find that it would be inappropriate to hold public hearings, or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation as provided by Section 232, as amended by the Trade Act of 1974.

J.A. 66.

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[4] The investigation may be commenced upon "request of the head of any department or agency, upon application of an interested party," or upon the Secretary's own motion. The Secretary must submit his recommendation for action or inaction within one year of the receipt of a request for or the start of an investigation.

Thereafter, comments were solicited from the Departments of State, Defense, Interior, Commerce and Labor, the Council of Economic Advisors, and the Federal Energy Administration.[5] On January 14, 1975, Secretary Simon reported as the result of his investigation that petroleum products were "being imported into the United States in such quantities as to threaten to impair the national security" and recommended that

> appropriate action be taken to reduce imports of crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar into the United States, to promote a lessened reliance upon such imports, to reduce the payments outflow and to create incentives for the use of alternative sources of energy to such imports. I understand that a Presidential Proclamation pursuant to [section 1862(b)] is being drafted by the Federal Energy Administration consistent with these recommendations.

A. 44.

On January 23, 1975, President Ford signed Proclamation No. 4341 which provided for a significant increase in the license fees initially imposed by former President Nixon. First, the fee schedule announced in 1973 was accelerated to their maximum levels of $0.21 per barrel on imported crude oil and $0.63 per

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[5] *See* 49 Fed. Reg. 4412-4465 (1975). Substantive responses were received from all departments except Labor who wrote that it could not conduct an appropriate investigation within the ten day time limit imposed by Secretary Simon.

barrel on petroleum products. Second, Proclamation 4341 imposed supplemental fees of $3 per barrel on imported crude oil and $1.30 per barrel on petroleum products. The supplemental fee on crude oil was to be instituted in three monthly dollar steps from February to April, while the petroleum products fee was to be added in March and April, 1975.[6]

On January 27, 1975, plaintiffs-appellants filed suit in district court. Plaintiffs, including eight states and their governors,[7] ten utility companies,[8] and one

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[6] Proc. 4341 did not affect the fee-free quotas under the Nixon-imposed fees, nor the schedule for their elimination. President Ford also reinstated the tariffs on petroleum products removed in 1973, but provided that they could be offset against the supplemental fees.

On February 19, 1975, Congress passed a bill imposing a 90-day moratorium upon the implementation of Proc. 4341. H.R. 1767, 94th Cong., 1st Sess. (1975). On March 4th, President Ford vetoed the bill, but suspended the imposition of the supplemental fees for two months. *See* 121 Cong. Rec. H. 1403; Proc. 4355, 40 Fed. Reg. 10437 (1975). On April 30th, he continued the suspension for an additional thirty days. Proc. 4370, 40 Fed. Reg. 19421 (1975). Finally, on June 1, 1975, President Ford imposed the second dollar of the supplemental fee. Proc. 4377, 40 Fed. Reg. 23429 (1975).

[7] Commonwealth of Massachusetts and Governor Michael S. Dukakis; State of Connecticut and Governor Ella Grasso; State of Maine and Governor James B. Longley; State of New Jersey and Governor Brendan T. Byrne; State of New York and Governor Hugh Carey; Commonwealth of Pennsylvania and Governor Milton J. Shapp; State of Rhode Island and Governor Philip W. Noel; and State of Vermont and Governor Thomas P. Salmon. The State of Minnesota subsequently intervened as a plaintiff.

[8] Algonquin SNG, Inc., New England Power Co., New Bedford Gas and Edison Light Co., Cambridge Electric Light

member of Congress,[9] asserted that the fees imposed by Presidents Nixon and Ford in Proclamations 4210 and 4341 exceeded their authority under 19 U.S.C. § 1862(b), that the Secretary of the Treasury failed to comply with the procedural requirements of that section, and that the government had failed to file a required environmental impact statement.

In a February 21st Order, the district court found jurisdiction under 28 U.S.C. §§ 1331 and 1340 and rejected the contention that the action was barred by the Tax Anti-Injunction Act, 26 U.S.C. § 7421 (1970). Although finding that appellants would suffer irreparable injury by the implementation of the program, the court refused to grant injunctive relief. The court found that the scope of presidential authority under section 1862(b) encompassed the power to impose license fees, "a regulatory measure enacted for the protection of national security." J.A. 290. The court also held that the Secretary of the Treasury had fulfilled the procedural requirements of section 1862(b) and that the failure to file an environmental impact statement was excused by an "emergency situation." J.A. 293. Final judgment was entered on March 11, 1975,[10] and this appeal fol-

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Co., Canal Electric Co., Montaup Electric Co., the Connecticut Light and Power Co., the Hartford Electric Light Co., Western Massachusetts Electric Light Co., and Holyoke Water Co.

[9] Representative Robert P. Drinan, SJ.

[10] In response [to] a motion by appellant, consented to by the government, the district court pursuant to *Fed. R. Civ. P.* 65 ordered that its conclusions, with respect to preliminary relief, constitute the court's final judgment.

lowed. On February 27, 1975, appellants also filed, pursuant to 15 U.S.C. § 766(i)(2)(A), a Petition for Review of emergency regulations promulgated by the Federal Energy Administration to implement the Ford supplemental fee program. *See* 40 Fed. Reg. 10437 (1975). In both appeals, now consolidated, appellants renew the contentions made to the district court."

II. MERITS

There is no controversy over the need for action to extricate this country from its increasingly dangerous dependence on foreign petroleum. Spending on foreign oil has increased from $2.7 billion in 1970 to about $24 billion in 1974, J.A. 187. In 1973, the United States was subjected to an oil embargo with disastrous economic consequences. As the district court stated: "The grave necessity of decreasing our dependence on foreign oil, and developing our own domestic industry and alternative sources of energy was and is a matter of primary national importance." J.A. 288-89.

Appellants do not challenge the Presidents' findings in this area but argue that the license fee program instituted by Presidents Nixon and Ford were beyond their statutory authority under section 1862(b).

[11] The one additional issue raised in the appeal of the implementing regulations is appellants' contention that the FEA violated the procedural provisions of the Federal Energy Administration Act, 15 U.S.C. §§ 761 *et seq.* In light of our conclusion that the President does not possess substantive power to impose the challenged fees, we do not reach this question.

Pointing to the statutory directive to "adjust imports", they assert that the legislative intent behind this provision was to grant authority to impose only direct import controls, such as quotas. Further, appellants rely heavily on the recent Supreme Court decisions in *National Cable Television Association, Inc.* v. *United States*, 415 U.S. 336 (1974) and *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974), arguing both that authority to impose license fees may not be implied without a clear statutory directive and that the statute should be interpreted to exclude such power to avoid constituting an unconstitutional delegation.

The Government and the President point to the statutory mandate to the President to "take such action . . . as he deems necessary" as evidencing the broad grant of authority in section 1862(b). This national security authority, they opine, encompasses both indirect and direct methods of adjusting imports, and thus would include the license fee program. The district court upheld the program, finding it

> one of a number of possible actions covered in the non-defined phrase "to adjust imports" contained in [section 1862(b)] and that the program including the fee is a regulatory measure enacted for the protection of national security. Certainly, if the term includes quotas and even a complete embargo, as plaintiffs admit, it can responsibly be interpreted to include imports subject to fees, however steep.

J.A. 290.

We must disagree and instead conclude that section 1862(b) does not authorize these fees. We reach this conclusion after studying the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs; the Government's construction of section 1862(b) would be an anomalous departure from that approach. We also find support for appellant's position in the legislative history of section 1862(b), both during its original passage in 1955 and its reenactment in 1962. Finally, recent Supreme Court pronouncements mitigate against the expansive statutory construction advanced by the Government.

A

Section 1862(b) was originally enacted in the Trade Agreements Extension Act of 1955 and is currently contained within the Trade Expansion Act of 1962. The purpose of both these bills was to assist this country's economic development through stimulation and expansion of foreign trade. *See, e.g.*, 19 U.S.C. § 1801 (1970). The statutes represent the most recent solution to a political struggle which has continued throughout our history—whether United States trade policy should be utilized to increase foreign markets or to protect domestic industry. The arena for this debate over trade policy, the "lifeblood of our nation", has been Congress, and the 1955 and 1962 Acts, along with the Trade Reform Act of 1974 all represent accomodations [*sic*] of varying interests arrayed on both sides of the issue. *See generally* Metzger *United States Foreign Trade: Past, Present, and Future*, 6 *Vill.L.Rev.* 503 (1961).

The mechanism to effectuate the policy contained in all these statutes is the reduction of barriers through reciprocal trade agreements between the United States and its trading partners. Since, naturally, Congress could not as a body conduct barrier reduction negotiations, that authority was delegated to the President within congressionally-defined limits and made subject to well-established safeguards. *See, e.g.*, 108 *Cong. Rec.* 19867 (1962) (statement of Senator Humphrey).

For example, section 201 of the 1962 Act, 19 U.S.C. § 1821 authorized the President to enter into agreements to ease restrictions which unduly burdened the foreign trade of the United States and modify existing restrictions to effectuate those agreements within specified limits.[12] Similarly, section 122 of the Trade Reform Act of 1974, 19 U.S.C. § 2132 delegates to the President power to meet balance-of-payments emergencies with duty surcharges, quotas, or both for a 150 day period. In fact, we may generalize from our examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-defined goals. *See, e.g.*, 19 U.S.C. §§ 1901, 1981 (injuries to domestic injuries); *id.* §§ 2251, 2253 (import relief for threat-

[12] Congress also mandated in this connection that the Tariff Commission was to have an advisory role in the process and that President desigate an agency to conduct public hearings. 19 U.S.C. §§ 1841, 1843.

ened domestic injuries); *id.* § 1351 (modify duties within limitations of 50% of existing tariff rates under reciprocal trade agreements). *See also Consumers Union of United States, Inc.* v. *Kissinger*, 506 F.2d 136, 141-43 (D.C.Cir. 1974), *cert. denied*, —— U.S. —— (1975).

Fitted against this scheme, the Government interpretation of section 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area. The Government has invoked this section as authorizing executive abolition of a tariff, *see* Proc. 4210, *supra*, and as conveying power to impose fees which would double the revenues collected from tariffs by the United States.[13] Moreover, the number of articles potentially covered under the umbrella of "national security" is great. Under these circumstances, such a massive assertion of executive authority in an area so thoroughly occupied by Congress requires careful scrutiny on our part to ascertain the extent of the legislative delegation.

B

The predecessor to section 1862(b) was first enacted in the Trade Agreements Extension Act of 1955, 69 Stat. 162. The problem which originally prompted the drafting of such a provision was petroleum,

[13] Proc. 4341 was expected to generate $4.8 billion in anuual revenues. In 1974 total revenues from all tariffs were $4.3 billion. *See* White House Fact Sheet at 13, J.A. 170. U.S. Customs Service, *Activity Report*, Fiscal Year 1974.

which was being imported in such amounts as to threaten domestic production. A voluntary program initiated by President Eisenhower in 1954 did not produce the desired reduction of imports.

Once the Senate turned to the problem, however, its inquiry was not confined to petroleum, nor was the eventual drafting of a generalized provision preordained. As the Senate Committee Report on the Trade Extension Act makes clear:

> The committee had before it several proposals dealing with specific commodities, namely petroleum, fluorspar, lead, and zinc. In lieu of specific action on each of these the committee adopted an amendment which specifies that the Director of the Office of Defense Mobilization shall report to the President when he has reason to believe that imports of a commodity are entering the United States in such quantities as to threaten to impair the national security; and that the President, if he finds a threat to the national security exists, shall take whatever action is necessary to adjust imports to a level that will not threaten to impair the national security.

S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). Remarks on the floor bring the history of the section into clear focus; rather than engaging in the potentially acrimonous process of selecting which commodities deserved protection under the guise of national security and establishing quotas for each, a generalized amendment was adopted. *See* 101 *Cong. Rec.* 5298 (1955) (statement of Senator Barkley); *id.* at 5297-98 (statements of Senators Flanders and

Byrd). That the intended scope of the action was limited to direct controls is brought out in a colloquy between Senator Saltonstall and Senator Byrd, the Chairman of the Committee which produced the bill:

> MR. SALTONSTALL. This is the final question I should like to address to the Senator. The problem of oil imports is taken care of in the last section of the bill. This gives the opportunity to the President to adjust imports, *under restrictive conditions or quotas*, after a report by the Director of Defense Mobilization, and after a separate independent investigation by the President if he believes the national security is being affected.
>
> MR. BYRD. That is correct, except the amendment applies to all commodities; it applies not only to oil, but to all commodities.
>
> MR. SALTONSTALL. It applies to all commodities, does it?
>
> MR. BYRD. Yes. In other words, it puts other commodities on the same basis as agricultural commodities. It simply leaves to the President the power, in his discretion, *to decide whether to impose a quota or to reduce the imports.*

Id. at 5297. (emphasis supplied).

The Government points to two statements from the same 1955 Senate floor debate as establishing that the intent behind the National Security Section was to give the President broad authority, including the power to impose license fees. Senator Bennett of Utah is quoted saying:

> As I understand the bill, the ODM will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry, and to meet its particular needs.

Id. at 5588. When placed in context, however, this statement offers no support for the Government's position. It was made to point out that the Senator's home-state of Utah's protection of fluorspar would be well protected and clearly was made in reference to the entire bill and other existing laws. *See, e.g.*, 50 U.S.C. §§ 98 *et seq.* (stockpiling); 19 U.S.C. §§ 1336, 1338, 1351 (tariff adjustments).

The second statement the Government offers appears more relevant. Senator Millikin, the ranking minority member of the committee which considered the bill, stated that the provision

> grants to the President authority to take whatever action he deems necessary to adjust imports if they should threaten to impair the national security. He may use tariffs, quotas, import taxes, or other methods of import restriction.

101 *Cong. Rec.* at 5299. At first blush, this passage would directly support the Government's position; several factors, however, blur its probative value. First, the statement was made in the somewhat self-serving posture of a revelation by Senator Millikin, as representative of Colorado which was a major supplier of coal and petroleum, that it "was of considerable importance . . . that this amendment provide an adequate vehicle for assistance to [such] industries . . . [and that he was] convinced that the

proposal can and will work." *Id.* Second is our normal reluctance to attach overriding weight to statements of individual legislators during floor debates. *See, e.g., United States* v. *Int'l Union of United Auto., Aircraft and Agr. Implement Workers of America*, 352 U.S. 567 (1957); *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *compare Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375 (D.C.Cir. 1973) (statement of *sponsors* entitled to weight). The third factor is our recognition that the Senator's statement is inconsistent with all the other legislative history recounted above.

Plaintiffs advance the Conference Report on the 1955 Act to counter any inference drawn from Senator Millikin's statement. Referring to the provision, the Conferees stated

> it is not intended to, and does not, diminish or impair any authority the President may have under other law.

Conf. Rep. No. 745, 84th Cong., 1st Sess. 6 (1955). Plaintiffs argue plausibly that for that conference statement to have content, section 1862(b) cannot grant the expansive authority that Government claims. They conclude by invoking the rule that committee reports are generally accorded greater weight than individual statements by legislators. *See, e.g., Housing Authority of City of Omaha, Neb.* v. *United States Housing Authority*, 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *American Airlines, Inc.* v. *CAB*, 365 F.2d 939 (D.C. Cir. 1966).

We find both sides' arguments probative, neither dispositive. While recognizing that sponsors' statements must be accorded weight, *see, e.g., National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967); *City of New York* v. *Train*, 494 F.2d 1033 (D.C.Cir. 1974), *aff'd*, 420 U.S. 53 (1975); *Portland Cement Ass'n* v. *Ruckelshaus, supra*, we also recognize that the statements of Senators Millikin and Byrd point in opposite directions. In light of all factors, we must conclude that the single floor statement that Government may justifiably rely upon is a woefully slender reed to support its construction of the statute.

That conclusion is buttressed by turning to the legislative history behind the Trade Expansion Act of 1962, 76 Stat. 872, the Act of which section 1862 (b) is actually a part. The Government asserts that section 1862(b) was included in the revision *pro forma*. Govt. Br. at 15 n.2. While no mention is made in the Senate Committee Report of the section or its intended scope, *S. Rep. No.* 2059, 87th Cong., 2d Sess. (1962), we believe that the intent of this Congress is indeed relevant, especially in light of another provision considered and rejected.

The Senate Finance Committee had added to the 1962 bill a proposed section 353:

> Notwithstanding any other provision of law, the President may, when he finds it in the Na-

tional interest, proclaim with respect to any article imported into the United States—

(1) the increase of any existing duty on such article to such rate as he finds necessary,

(2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary, and

(3) the imposition of such other import restrictions as he finds necessary.

108 *Cong. Rec.* 19875 (1962). Quite simply, the proposal explicitly gave the President the same authority he claims derives implicitly from section 1862(b). Senator Holland baldly stated that section 353 "is a very great departure from anything that the Congress has ever done before by way of granting power to the Executive in the field of trade." *Id.*[14] The provision passed the Senate, but was deleted in conference. Explaining its removal, Senator Byrd, Chairman of the sponsoring Senate Finance Committee stated:

> Section 353 was a sword which would cut two ways: First, one problem was that there was no procedure prescribed for ascertaining the facts and second, the other problem was that the Congress did not retain the same opportunity

[14] Senator Holland opposed the bill. While statements of opponents normally are no authorative guide to construing the statute, *see* Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967), they may sometimes be useful, especially where proponents make no response. Arizona v. California, 373 U.S. 546 (1963). In this case, we find Senator Holland's statement relevant in light of the fact that his view eventually prevailed.

for review as the other sections of the bill provide.

Id. at 22182.

Two conclusions, equally devastating to the Government's position, can be drawn. The fact that the proposal was introduced at all yields the inference the Congress believed that no other provision of the Act conferred that authority. *See, e.g., United States* v.*Carter*, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *Fisher Flouring Mills Co.* v. *United States*, 270 F.2d 27 (9th Cir. 1958). We also must conclude that Congress' eventual rejection of the provision indicates that it did not desire to confer this authority and discretion upon the President.

This reading of the intent of the 1962 Congress, couple [*sic*] with the lack of strong evidence to the contrary concerning the 1955 Congress, mandate the conclusion that the President does not currently possess the authority to impose indirect controls. We note that recently the Customs Court reached the same conclusion regarding the legislative history behind section 1862(b). *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155, 1166 (Cust. Ct. 1974).

We have examined the cases the Government has cited to us interpreting section 1862(b) and find that none dictate an opposite conclusion. Both *Texas American Asphalt Corp.* v. *Walker*, 177 F. Supp. 315, 326 (S.D. Tex. 1959) and *Pancoastal Petroleum, Ltd.* v. *Udall*, 348 F.2d 805 (D.C. Cir. 1965) dealt with challenges to particular quota allocations un-

der MOIP; both upheld the President's discretion in establishing the mechanism by which direct controls were to be administered. Neither provides any support for the proposition that section 1862(b) conveys power to impose indirect controls. In this regard, Judge McGowan's description of section 1862(b) in *Consumers Union of United States, Inc.* v. *Kissinger, supra*, 506 F.2d at 142 (emphasis supplied, footnote omitted), is particularly apropos:

> action shall be taken "to adjust the imports" of the article in question, *which means that the article may by regulation be excluded from entry or withdrawal from warehouse.*

Finally, we have examined the present Congress' response to the President's actions. Congress passed a bill suspending for a ninety day period the imposition of the supplemental fees, which President Ford vetoed. However, we cannot interpret this conduct, obviously meant to preserve the status quo, as acquiescence to the presidential assertion of authority. *Cf. Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464 (2d Cir.), *cert denied*, 385 U.S. 974 (1966); *Brennan* v. *Midwestern United Life Insurance Co.*, 259 F. Supp 673 (N.D. Ind. 1966). As the Committee Report makes clear:

> The Committee has been informed that a suit his been instituted to test the validity of the President's action . . . . The Committee does not intend that its action in reporting out H.R. 1767 . . . should affect in one way or another the determination in this suit . . . on the merits of issues relating to the scope of Presidential authority or the validity of any particular exercise of that authority under section 232(b) of the Trade Expansion Act of 1962 or any other provision of law.
>
> Furthermore, it is not the purpose of this Act to limit, expand or otherwise alter the authority delegated to the President under Section 232 of the Trade Expansion Act of 1962, as amended. Nor is it the purpose of this Act to confirm or ratify that the President, purportedly acting under the authority of the national security provision of Section 232 of the Trade Expansion Act, as amended, either with or without public hearings, has lawfully imposed, or may lawfully impose, monetary charges, however denominated on imports whether by Proclamation or otherwise.

S. Rep. No. 94-11, 94th Cong., 1st Sess. 7 (1975). *See also H. Rep. No.* 94-1, 94th Cong., 1st Sess. 14-15 (1975). Similarly, we do not find acquiescence in the lack of an immediate challenge to the Nixon Proclamation in light of the cushioning of its impact by the fee-free provision and the virtually immediate undercutting of the rationale behind the program before its "bite" was felt by the economic events of 1973 and 1974 [*sic*].

C

The conclusion that section 1862(b) only authorizes the President to adjust imports through direct methods does not in itself necessitate invalidation of the challenged license fee program. The President has

wide discretion in establishing the mechanism and administrative framework for controls. Within that framework, it would be logical and consistent with Congress' intent to permit the President to impose license fees of a magnitude to off-set the administrative costs of the allocation program. We must therefore inquire whether we may sustain the challenged program on that ground.

The President, in the material accompanying his 1975 State of [the] Union Address, has set forth his interpretation of the distinction between a tax, tariff, and a fee:

> All three are charges which can be used to produe revenue and all three have the effect of reducing demand. The differences lie in the source of authority to levy the change. A tax must be levied by Congress for the purpose of raising domestic revenue. A tariff is a charge against imports and must also be authorized by the Congress. *A fee is also levied on imported material but may be set for non-revenue purposes and need not be legislated.*

J.A. 213 (emphasis supplied). We cannot concur in tha. expansive assessment of the scope of a fee and in fact find it inconsistent with recent Supreme Court holdings in the area.

In *National Cable Television Association, Inc* v. *United States, supra*, the Supreme Court rejected a fee purportedly justifiable on the rationale, as the face of the relevant statute 31 U.S.C § 483a apparently authorized, that its assessment was in the pub-

lic interest. The Court distinguished between a tax, which could be imposed arbitrarily and without regard for benefits bestowed, and a fee, which "is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 366 U.S. at 340. The Court found that fees must be related to the benefits they conferred, and that allowing an agency to use a public policy mandate to go beyond this limitation "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." [15] *Id.* at 341; *accord, FPC* v. *New England Power Co., supra.*

We believe that this approach is dispositive, although the character of the "fee" is different, of the claim of the legitimacy fo charges imposed on imported petroleum under section 1862(b). We have already acknowledged that there could be an administrative "fee" to cover the costs of administration. What we have here, however, is a regulatory charge, laid down by the Executive for policy reasons, carried far from the "customary orbit" of a fee into broad domains of revenue. Indeed, the oil charges here involved are expected eventually to gen-

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[15] The Court also noted that an assessment is made heavy if the activity in question was to be discouraged and that the levy is "slight if a bounty is to be bestowed" but concluded that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341. Of course, assessing fees to discourage activity is the core of the challenged program.

erate $4.8 billion annually, more than the entire 1974 United States Customs revenue. Although a new terminology was devised by President Nixon, and continued by President Ford, we see no logical or realistic basis of disputing the Tariff Commission's comment that "the new program is substantively a duty system." [16] Similarly we find no merit in the President's 1975 statement that any charge on imports is a fee, as distinguished from a tariff, if it is "set for non-revenue purposes." From earliest days, the tariff authority given Congress by the Constitution has been understood to apply to the "protective tariff" sponsored by Alexander Hamilton, a measure focused not on obtaining tariff revenues but on the "non-revenue purpose" of protecting domestic industry against foreign competition. With some change in meaning, the oil import charge can also be termed a "protective tariff," protective of national security in conditions of enormous domestic demand, but it is a measure for imposition only by the legislature or on delegation plainly authorized by the legislature. As for the concept of an administrative fee

[16] The President has created a new mechanism for import adjustment called a license fee. The analysis, however, suggests that what Proclamation 4210 does is substitute a duty system for the quota mechanism of the Mandatory Oil Import Program, for the license fee has the incidences of a duty. The name is new and the administration has been shifted from the Department of the Treasury, (U.S.) Custom Service to the Department of the Interior. Nonetheless, the new program is substantively a duty system[.]

Tariff Commission Report at 97.

based on "benefit," that has nothing to do with the kind of charge before us.[17] The history of the kind of charge involved has much to do with Congressional intent to authorize executive modification, and we are clear that a charge for the privilege of importing is a tariff or duty that Congress has historically and steadfastly kept for its own determination, and that none of these carefully limited authorizations for executive change applies to the case at hand.

In sum, the President's expansive definition of a legitimate fee cannot be accepted. We must also conclude that the programs instituted by Presidents Nixon and Ford cannot be upheld as a proper license fee. To consider it as such would make a travesty of the term. It is, as the district court found, a "regulatory measure"—an indirect control on imports—and thus outside the scope of section 1862(b).

III. Conclusion

We think it important to describe precisely the breadth of our holding. We find that in 19 U.S.C. § 1862(b) Congress only delegated authority to the President to adjust imports to protect national security through direct mechanisms. Consequently, the two-tier program of license fees initiated by Presi-

[17] While there may be a useful concept of a fee based on "benefit" the term would be grossly distorted if stretched to this case on the ground that if there were no "benefit" the importer would not pay the charge and consummate the import, for that kind of stretch would make it applicable to all tariffs and duties.

dents Nixon and Ford are beyond the scope of their section 1862(b) authority and cannot stand.[18] By this conclusion, we do not say that Congress cannot constitutionally delegate, accompanied by an intelligible standard, such authority to the President; we merely find that they have not done so by this statute. We reach no conclusion on any delegation issue raised by the parties. Similarly, we do not reach the procedural challenges that appellants have raised to the section 1862 investigation by defendant Simon, to the imposition of the program or to the FEA regulations.

We recognize that we are overturning an honest attempt by the President to find a solution to a difficult crisis; at stake is nothing less than our country's economic freedom and survival. We also realize that the judicial branch was accused of straightjacketing the coordinate branches of Government in their attempt to alleviate the massive economic dislocation created by another grave crisis, the Great Depression. We do not believe that any such criticism would be justifiable here. The President could have moved against this problem on a unilateral basis through direct controls. Alternatively, he could have sought, as he has, additional measures from Congress.

More fundamentally, this case raises a question

[18] Similarly, Section 1862(b) would not allow a President to suspend duly enacted tariffs such as President Nixon did in Proclamation 4210. Of course, President Ford reimposed the tariffs in Proclamation 4341, and no relief is now appropriate.

about the way Government should operate when responding to crisis. Neither the term "national security" nor "emergency" is a talisman, the thaumaturgic invocation of which should, *ipso facto*, suspend the normal checks and balances on each branch of Government. Our laws were not established merely to be followed only when times are tranquil. If our system is to survive, we must respond to even the most difficult of problems in a manner consistent with the limitations placed upon the Congress, the President, and the Court by our Constitution and our laws. We believe we reaffirm that basic principle today.

The judgments appealed from in Nos. 75-1281 and 75-1282 are reversed and remanded with instructions to enter appropriate relief for appellants. The regulations challenged in Nos. 75-1202 and 75-1206 are set aside.

So ordered.

ROBB, *Circuit Judge, dissenting*: The majority concludes that what the President can do directly he cannot do indirectly. On the basis of this conclusion the majority overturns what it concedes to be "an honest attempt by the President to find a solution to a difficult crisis". Since I cannot agree that the President has exceeded his delegated authority I dissent.

As amended by the Trade Act of 1974, section 232 (b) of the Trade Extension Act of 1962, 19 U.S. C.A. § 1862(b) (Supp. 1, Feb. 1975), provides that

if the Secretary of the Treasury finds that an article of commerce is being imported into the United States so as to threaten to impair the national security he shall so advise the President, and

> the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

The majority holds that under this statute Congress delegated to the President only the authority "to adjust imports to protect national security through direct mechanisms". This means, presumably, that in the interest of national security the President can use "direct mechanisms", such as quotas, to adjust imports by placing restrictions or even a complete embargo on foreign oil imports, but he cannot achieve the same result by means of indirect mechanisms, such as import license fees. I cannot find any such distinction in the statute. The statute authorizes the President to "take such action . . . as he deems necessary to adjust . . . imports", without purporting to limit in any way the kind of action available to the President. Admittedly, quotas have a direct effect on imports, whereas license fees have an indirect effect. But both affect imports, and I cannot see how the plain and broad language of section 232(b) can be

read to limit the President to the use of one or the other.

The majority rests its holding on three grounds: (1) that the broad Presidential power exercised here is unprecedented in the history of foreign trade regulation; (2) that the legislative history of section 232 does not support the government's position; and (3) that two recent Supreme Court decisions militate against the government's position. As to the first ground: however guarded Congress may have been in the past in delegating to the President the power to regulate foreign commerce, section 232 is a plain delegation of broad power where national security interests are involved. As to the second, the legislative history of section 232 is hopelessly ambiguous and inconclusive. In my opinion the floor debates do not provide an adequate foundation for a restrictive reading of section 232. Finally, the two Supreme Court decisions cited by the majority deal with license fees charged by administrative agencies to recover costs incurred by them in carrying out their regulatory functions. Any similarity between such license fees and the license fees involved here is in name only. Here the license fees are imposed for the purpose of regulating foreign commerce and not to recover governmental expenses related to such regulation.

The majority is driven to its conclusion by its concern that "[i]f our system is to survive, we must respond to even the most difficult of problems in a manner consistent with the limitations placed upon

the Congress, the President, and the Courts by our Constitution and our laws." While I share this concern, I believe the court should not interfere in this dispute between the President and Congress. The power to regulate foreign commerce belongs to Congress, and it may delegate as much or as little as it chooses to the President. If it determines it has gone too far, Congress may withdraw the delegated power from the President. Here the delegated power is broad, and Congress has had repeated opportunities to limit it or withdraw it altogether. It has not done so, and I think this court should not do so.

As for the other issues raised by the parties, they are adequately treated in the opinion of the District Court, embodied in the court's findings of fact and conclusions of law. Since this opinion is unreported, I have set it out as an appendix to this dissent.

[Appendix omitted.]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

[Filed Aug. 11, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 75-1202

ALGONQUIN SNG, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

No. 75-1206

COMMONWEALTH OF MASSACHUSETTS AND MICHAEL S. DUKAKIS, GOVERNOR, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

Petitions for Review of an Order of the Federal Energy Administration

Before: TAMM, LEVENTHAL and ROBB, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Federal Energy Adminis-

tration and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the regulations challenged in the above entitled cases are set aside, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline/rb
HUGH E. KLINE
Clerk

Date: August 11, 1975

Opinion for the Court filed by Circuit Judge Tamm.
Dissenting opinion filed by Circuit Judge Robb.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

[Filed Aug. 11, 1975, United States Court of Appeals
for the District of Columbia Circuit,
Hugh E. Kline, Clerk]

No. 75-1281

Civil 75-0129

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM E. SIMON, ET AL.

No. 75-1282

Civil 75-0130

ALGONQUIN SNG, INC., ET AL., APPELLANTS

v.

WILLIAM E. SIMON, ET AL.

Appeals from the United States District Court
for the District of Columbia

Before: TAMM, LEVENTHAL and ROBB, Circuit Judges

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, and in accordance with the opinion of this Court filed herein this date, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these causes are reversed and these cases are remanded with instructions to enter appropriate relief for appellants.

Per Curiam
For the Court

/s/ Hugh E. Kline/rb
HUGH E. KLINE
Clerk

Date: August 11, 1975

Opinion for the Court filed by Circuit Judge Tamm.
Dissenting opinion filed by Circuit Judge Robb.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed Feb. 21, 1975, James E. Davey, Clerk]

Civil Action No. 75-0129

COMMONWEALTH OF MASSACHUSETTS *et al.*, PLAINTIFFS

v.

WILLIAM E. SIMON *et al.*, DEFENDANTS

Civil Action No. 75-0130

ALGONQUIN SNG, INC. *et al.*, PLAINTIFFS

v.

WILLIAM E. SIMON *et al.*, DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The two consolidated cases were brought by several northeastern states and their governors and several utilities against the Secretary of the Treasury and the Administrator of the Federal Energy Administration. In addition, the State of Minnesota has been granted leave to intervene. These suits challenge on various statutory and constitutional grounds Proclamation No. 4341 issued by the President on

January 23, 1975. This Proclamation, among other things, imposes a supplemental [1] license fee on the importation of oil and certain petroleum products into the United States.

The thrust of the two complaints rests on several underpinnings:

(1) The Proclamation 4341 issued by the President pursuant to Section 232(b) of the Trade Expansion Act, 19 U.S.C. § 1862(b) is an unconstitutional delegation by Congress of legislative power;

(2) The statutory provisions relied upon, even if constitutional, do not give the authority to enact this particular program or plan;

(3) In taking the action he did, pursuant to Section 232(b) the President did not meet the procedural requirements set forth in the statute; and

(4) The program is being implemented without compliance with the requirements of National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* in that an EIS should have been prepared before action was taken.

There are other subsidiary grounds but the ones just recited appear to be the more important.

The case has come before the Court on plaintiffs' motions for a preliminary injunction which would restrain defendants from imposing the requirement of an import license subject to the payment of a fee as provided for in Proclamation 4341.

---

[1] The fee is supplemental because it is imposed in addition to certain license fees provided by Presidential Proclamation 4210 issued by President Nixon on April 18, 1973.

Secondly [*sic*], defendants oppose the granting of the relief sought on the grounds that plaintiffs cannot meet the criteria for granting a preliminary injunction. More specifically, defendants contend that the relief sought is barred by the Anti-Injunction Act, 26 U.S.C. 7421, that the President's action is in accord with constitutional and statutory requirements and that the public interest would be seriously affected by even a brief delay in the implementation of the President's program. So much for a brief description of the contentions of the parties and the present posture of the litigation.

Memoranda of points and authorities of great length together with hundreds of pages of supporting affidavits, have been filed in support of the respective positions as well as two supplemental submissions requested by the Court on the possible issue that this controversy is a "political question" which the doctrine of separation of powers as well as prudence and good sense would cause us to avoid. These, in addition to the arguments of counsel, have been most helpful.

Since plaintiffs have conceded that the President's determination that his program is required in the interests of national security is a finding which is not subject to judicial review, it appears that objection to our jurisdiction on "political question" grounds have been obviated and that the case is ready for disposition.

By way of a brief summary of the historical background, it is common knowledge that foreign oil

importations have been a serious problem for many years. In 1959, President Eisenhower in Proclamation 3729 set up a Mandatory Oil Import Program which established a system of oil import quotas, the reason being that foreign oil was being imported in such large quantities and at such low prices as to threaten the development of the domestic petroleum industry. The use of quotas was continued with several amendments from time to time, when President Nixon issued Proclamation 4210 on April 18, 1973, which eliminated the quota restrictions on oil imports, permitted importations up to the previous quota on a fee free basis, and substituted a fee system for all importations in excess of old quota levels. Because of rapidly increasing domestic demand for oil, U.S. domestic production was not keeping pace; greater levels of imports but at a slightly higher cost were permitted under this Proclamation.

The basic seriousness of this problem became indelibly underlined as a result of the embargo of last winter which caused a sharp drop in our gross national product, threw a half-million persons out of work, increased the cost of foreign oil from $3 billion in 1970 to $24 billion in 1974, thereby contributing to our unfavorable balance of trade and triggering the price inflation which, along with rising unemploymen, is perhaps the most important problem facing the leadership of this country. The grave necessity of decreasing our dependence on foreign oil, and developing our own domestic industry and alternative sources of energy was and is a matter of primary national

importance. This set of conditions provides the background for the President's action in issuing Proclamation 4341 on January 23, 1975. He acted in response to a report submitted to him on January 14, 1975 by Secretary Simon. In this report purportedly made pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and resulting from an investigation under that section, the Secretary found in substance that foreign oil was being imported into the U.S. in such quantities and under such circumstances as to threaten to impair the national security. On the basis of this finding, the Secretary recommended to the President "that appropriate action be taken to reduce imports." The President, accepting the Secretary's report, finding and recommendation, issued the Proclamation. It is stated to be an important part of the President's energy program, consisting of several elements, which admittedly will increase energy costs over the whole country. The New England states will be hardest hit because oil supplies 86% of the energy needs of that region as contrasted with 46% for the country as a whole. The affidavits on behalf on the several states confirm the particularly serious impact which the measure will have on them.

In acting as he did, the President took action "to *adjust the imports* of such article and its derivatives so that such imports will not so thereaten to impair the national security." 19 U.S.C. § 1862(b) The license fee system was the device he used.

It is necessary to identify as best we can the precise category into which this program falls. If it is a tariff or duty as plaintiffs might, but expressly do not, contend, jurisdiction to hear this case would lie in the Customs Court under 28 U.S.C § 1582. The Customs Court could provide no relief because it lacks equity jurisdiction and these suits see [*sic*] injunctive relief. If it is a tax, the delegation of which power by Congress is improper, the plaintiffs are met with the Anti-Injunction Act which, except for certain limited exceptions, is a bar to suits for the purpose of restraining the assessment or collection of a tax. 26 U.S.C § 7421(a).

It is our judgment that the license fee program is one of a number of possible actions covered in the non-defined phrase "to adjust imports" contained in Section 232(b) and that the program including the fee is a regulatory measure enacted for the protection of national security. Certainly, if the term includes quotas and even a complete embargo, as plaintiffs admit, it can responsibly be interpreted to include imports subject to fees, however steep. The statements of Senator Milliken and Bennett, the former quoted in both memoranda, indicate that the President was given a broad panoply of powers in Section 232. As such, we believe our jurisdiction to decide the validity of the fee is predicated on 28 U.S.C. §§ 1331 or 1340.

Passing to the specific objections, plaintiffs contend at the outset that Section 232 is an undue delegation of legislative authority. A corrollary to this

argument is that the delegation lacks adequate standards, and, if unheld, would confer unbridled discretion on the President. We have heard and been impressed with Mr. Connole's argument that delegations of power by the Congress to the President to adjust tariffs have always been accompanied by rather strict limitations and conditions. However, we disagree with his conclusion that this delegation particularly is defective. The non-delegation doctrine is almost a complete failure. As Professor Davis has put it:

> "Lawyers who try to win cases by arguing that delegations are unconstitutional almost invariably do more harm than good to their clients' interests." Davis—*Administrative Law Treatise*, Vol. 1, § 2.01 p. 75 (1958).

The vaguest of standards have been held adequate and various delegations without any standards have been upheld. *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *Arizona* v. *California*, 378 U.S. 546 (1963). *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935), the only two cases in American history holding invalid congressional delegations of authority, are now 40 years old and have been consistently undermined. Furthemore, Section 232 provides certain standards, even though general and somewhat imprecise. The President can only act when imports "threaten to impair the national security" and the section sets forth in detail a number of factors which the President must consider when acting

pursuant to Section 232. In the tariff analogy previously referred to, it is not there required that a prior determination of the actual impairment to the national security be made before the President exercised the tariff powers delegated to him. Accordingly, we hold that Section 232 is a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security.

Next, plaintiffs charge that, even if a valid delegation of authority, the President in promulgating Proclamation 4341 did not meet the procedural requirements of the statute. The procedural conditions set forth in Section 232(b) consist of five separate steps:

(1) The Secretary of the Treasury must undertake an appropriate investigation. While the chronological time was only 10 days (January 4 to January 14, 1975), it must be recalled that since January, 1973, this particular individual, Mr. Simon, had been living with this problem and was deeply involved in the formulation of oil import policy, first as chairman of the Oil Import Policy Committee, then as Administrator of the Federal Energy Commission, and finally as Secretary of the Treasury.

(2) In addition to appointing David Macdonald, Assistant Secretary of the Treasury for Enforcement, Operations and Tariff, to conduct the investigation, consultation was held with numerous high officials of departments and agencies to determine the effects on

national security. Extensive affidavits from these gentlemen are a part of the record.

(3) Secretary Simon on January 14, 1975, made a report of his findings and recommendation for action within one year after beginning his investigation. Having concluded that the continued level of importations threatened to impair the national security,

(4) he advised the President,

(5) who agreed with the Secretary's findings and recommendation, and took the action he deemed necessary to adjust imports "so that such imports will not so threaten to impair the national security."

It is perfectly true, as Mr. Bellotti has noted, the relative speed of this entire process may auger against its thoroughness and completeness. However, this ignores the fact that the problem of our dependence on foreign oil has been with us for months and years, has been extensively debated in and out of government, and that the President's finding of national security implications was but a restatement of what all knowledgable people knew to be the fact.

It is also recognized that the statute by recent amendment provides for the holding of a public hearing "if it is appropriate." The Secretary in his discretion decided it was not appropriate to hold public hearings and, in view of the importance of prompt action in what the President, in effect, found to be an emergency, we will not question his exercise of discretion. There is no constitutional or statutory right to a hearing. The procedural steps in our judgment were all taken.

Finally, plaintiffs allege that defendants violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* by failing to prepare an EIS before implementing the Proclamation.

Defendants concede their duty to comply with Section 102(2)(c) of NEPA, but argue that the Act does not, under all circumstances, require an environmental impact statement before the implementation of the government action. Defendant argues that when, as here, the government action is in response to an emergency or for reasons of national security, strict compliance with the procedural requirements of NEPA is not mandated. This is especially true, defendants argue, when the initial environmental assessment discloses no short term environmental impact. Defendants therefore maintain that, for the present, the abbreviated environmental report issued January 21, 1975, will suffice. An environmental impact statement will be published May 15.

The case law is clear that NEPA must be complied with to the fullest extent possible, unless there is a clear conflict with a statutory duty or some other impediment that makes full compliance excusable. If defendants can show that drafting an impact statement will prevent its performance in meeting an emergency situation, then it will be excused from strict compliance. *Calvert Cliffs' Coordinating Committee* v. *A.E.C.*, 449 F.2d 1109 (D.D.C. 1971).

Defendants' reasons for not complying with NEPA involve considerations of national security. When he issued the Proclamation on January 23, the President stated: "Whereas, I find and declare that adjustments must be made in imports of crude oil . . . so that such imports will not so threaten to impair the national security." The President went on to state: "Whereas, I judge it necessary and consistent with the national security to further discourage importation . . ."

In addition, as the affidavits of Mr. Woodcock, Associate Assistant Administrator of FEA for Environmental Programs, and Russell Peterson, Chairman of Council on Environmental Quality, show (1) the filing of a preliminary report analyzing the potential short and long term environmental imports of the revised oil import program. This was made public the day Proclamation 4341 was issued. And (2) the commencement of a full EIS to be filed on May 15, 1975.

Under all the circumstances, we conclude that full compliance with the EIS requirements of NEPA will take place in the near future and that to have delayed issuance of the President's Proclamation until an EIS has been filed would not have been justified in view of the emergency nature of the problem and the need for prompt action.

Finally, turning to the relief requested, namely a preliminary injunction, it is recognized that our jurisdiction to grant equitable relief is limited and is subject to certain criteria. They are:

(1) A strong showing by petitioner that it is likely to prevail on the merits;

(2) Irreparable injury;

(3) Possibility of harm to other interested in the proceedings;

(4) The public interest.

The Court has at all times recognized the irreparable injury to plaintiffs, both the states and the private utility companies. The record is silent on possible injury to others interested in this proceeding and we will therefore assume that there is no such injury or possibility which should otherwise militate against the grant of injunctive relief.

However, it is our judgment that plaintiffs have not made a strong showing that it is likely that they will prevail on the merits. Further, we must accept the President's determination of national security upon which his action was predicated. Certainly, our continued dependence on imports of foreign oil threatens our national security, the economy, the posture of our defense and the conduct of our foreign affairs. We cannot predict or pass upon the effectiveness of the Presidential program. We must accept it as it is and hold that any interference by way of injunctive relief would be inconsistent with the public interest.

Accordingly, it is by the Court this 21st day of February, 1975,

ORDERED, that plaintiffs' motions for preliminary injunctions be and they are hereby denied.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of FRCP.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

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Supreme Court, U. S.
FILED
JAN 14 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL.,
Petitioners

—v.—

ALGONQUIN SNG, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED
SEPTEMBER 10, 1975
CERTIORARI GRANTED NOVEMBER 3, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL.,
Petitioners

—*v.*—

ALGONQUIN SNG, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RELEVANT DOCKET ENTRIES

PARTIES

COMMONWEALTH OF MASSACHUSETTS AND
MICHAEL S. DUKAKIS, GOVERNOR
STATE OF CONNECTICUT AND
ELLA GRASSO, GOVERNOR
STATE OF MAINE AND
JAMES B. LONGLEY, GOVERNOR
STATE OF NEW JERSEY AND
BRENDAN T. BYRNE, GOVERNOR
STATE OF NEW YORK AND
HUGH CAREY, GOVERNOR
COMMONWEALTH OF PENNSYLVANIA AND
MILTON J. SHAPP, GOVERNOR
STATE OF RHODE ISLAND AND
PHILIP W. NOEL, GOVERNOR
STATE OF VERMONT AND
THOMAS P. SALMON, GOVERNOR
STATE OF MINNESOTA

vs.

1. WILLIAM E. SIMON,
   Secretary of the Treasury of the
   United States

2. FRANK G. ZARB,
   Administrator of the Federal
   Energy Administration

DATE	NR.	PROCEEDINGS
1975		
Jan. 27		COMPLAINT, appearance. #1, A.G. ser 1-29-75; D.A. ser 1-28-75; #2 ser 1-31-75.

DATE	NR.	PROCEEDINGS

Feb. 3 MOTION by pltff for preliminary injunction; P & A's; affidavits (2); Exhibits A, B and C; affidavit of Michael S. Dukakis; affidavit of John R. Buckley; table 1 and 2; affidavit of Paul F. Levy; table A, B and C; affidavit of Wessily Leontief; affidavit of Evelyn F. Murphy; affidavit of the Honorable James B. Longley; affidavit of Timothy P. Wilson; affidavit of Donaldson Koons; affidavit of Otto W. Siebert; table 1; affidavit of Brendan T. Byrne; affidavit of Clifford A. Goldman; affidavit of Joseph A. Hoffman; affidavit of Almerin C. O'-Hara, Exhibit 1, 2 and 3; affidavit of Terence P. Curran; affidavit of William Elgin; affidavit of Albert E. Smigel; Exhibit A and B; affidavit of J. Joseph Garrahy; request for oral hearing; c/s 2-3-75.

Feb. 6 AFFIDAVIT of Ella T. Grasso, Governor, in support of motion for a Preliminary Injunction.

Feb. 6 AFFIDAVIT of George J. Conkling in support of motion for a Preliminary Injunction.

Feb. 6 AFFIDAVIT of Richard M. Stewart.

Feb. 6 AFFIDAVIT of Lynn Alan Brooks.

Feb. 6 AFFIDAVIT of Ralph E. Reuss.

Feb. 12 NOTICE and Motion by State of Minnesota, by Wendell R. Anderson, its Governor for leave to intervene as a pltff.; P & A's; Exhibit; c/b 2-10-75. $5.00 paid and credited to U.S.

Feb. 12 ORDER granting motion of pltff. to consolidate with C.A. 75-0129, consolidated hearing on motions for preliminary injunction set for February 21, 1975. (N) (Original filed in C.A. 75-0130)

Pratt, J.

Feb. 13 MOTION of State of Minnesota to intervene as pltff, granted. (fiat) (N).

Pratt, J.

DATE	NR.	PROCEEDINGS

Feb. 14 COMPLAINT by intervenor State of Minnesota.

Feb. 14 OPPOSITION by deft. to motion for preliminary injunction; P & A's; affidavit of William E. Simon; affidavit of Russell W. Peterson; affidavit of Kenneth R. Woodcock with attachments A and B; affidavit of Eric R. Zausner with attachments A, B, C, D, E, F, G, H, I and J; c/m 2-14-75.

Feb. 14 AFFIDAVIT of Hugh L. Carey in support of motion of State of New York for preliminary injunction; c/m 2-13-75.

Feb. 14 AFFIDAVIT of Thomas P. Salmon in support of motion of State of Vermont for preliminary injunction; c/m 2-13-75.

Feb. 14 AFFIDAVIT of Wayne P. Calderara, Sr., in support of motion of State of Vermont for preliminary injunction; c/m 2-13-75.

Feb. 14 AFFIDAVIT of Forrest E. Orr for support of motion of State of Vermont for preliminary injunction; c/m 2-13-75.

Feb. 14 APPEARANCE of James S. Hostetler for the pltff. Cal/N.

Feb. 14 NOTICE and motion by pltff-intervenor State of Minnesota for preliminary injunction; P & A's; affidavit of Hon. Wendell R. Anderson; affidavit of Dr. James E. Carter; c/m 2-13-75.

Feb. 19 SUPPLEMENTAL memorandum of P & A's; in support of defts' opposition to the motion for preliminary injunction; c/m 2-19-75.

Feb. 20 SUPPLEMENTAL Statement of points and authorities on the preliminary injunction by pltff.

Feb. 21 MOTIONS of pltffs for preliminary injunction, heard and denied. (Rep: Richard Mattson)

Pratt, J.

DATE	NR.	PROCEEDINGS

Feb. 21 FINDINGS of fact and conclusions of law and Order denying pltffs. motions for preliminary injunction. (N) Pratt, J.

Mar. 03 NOTICE of appeal by pltffs from Order of February 21, 1975. $5.00 paid and credited to U.S. Copy mailed to Stanley D. Rose; U.S. Atty.

Mar. 03 COST bond on appeal by pltff. in sum of Two hundred fifty dollars with Northwestern National Insurance Co. of Milwaukee, Wisconsin, approved.

Mar. 07 MOTION by pltffs for consolidation of hearings on preliminary injunctions and merits and for entry of findings, conclusions of law and judgment; c/m 3-7-75.

Mar. 11 ORDER granting motion of pltff to treat hearing on preliminary injunction as hearing on the merits and the Findings of Fact and Conclusions of Law and Order of 2-21-75, shall constitute the Court's final Judgment. (N) Pratt, J.

Mar. 13 TRANSCRIPT of Proceedings, February 21, 1975; Rep: Richard L. Mattson; Court Copy.

Mar. 13 MOTION by pltff for withdrawal of notice of appeal from order denying motions for preliminary injunction and for leave to have the bond filed with said notice of appeal applied to pltffs' appeal from the final judgment in the case; c/m 3-12-75.

Mar. 13 NOTICE of appeal by pltff from final judgment entered March 11, 1975. Copy mailed to Stanley D. Rose, Dept. of Justice.

Mar. 20 ORDER granting pltffs' motion to withdraw their notice of appeal from order of 2-21-75; bond for costs filed with pltffs' notice of appeal from order of 2-21-75 be applied to pltffs' appeal of 3-11-75. (N) (signed 3-19-75) Pratt, J.

DATE	NR.	PROCEEDINGS

Mar. 25 PRELIMINARY record on appeal delivered to U.S.C.A.; receipt acknowledged (75-1281)

Apr. 8 RECORD on Appeal delivered to U.S.C.A.; receipt acknowledged.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

75-1281

DATE	FILINGS—PROCEEDINGS
(C) 3-21-75	Certified Original Preliminary Record (No Transcripts)
(K) 3-24-75	4-Appellant's motion for expedited briefing schedule, advancement of hearing and leave to file xerox brief (m-24)
(K) 4-2-75	4-Appellee's opposition to motion for expedited briefing schedule and response to motions for consolidation, advancement of hearing and leave to file xeroxed briefs and leave to file brief in excess of page limitation (Ok RB) (m-2) (only in 75-1282)
(K) 4-8-75	Certified Original Record (1 vol. of transcript) (two volumes of original record)
(R) 4-18-75	Per Curiam order that nos. 75-1202, 75-1206, 75-1281 and 75-1282 are consolidated for consideration on the merits; the motions for leave to file briefs in excess of page limitations are denied; the motion to expedite briefing schedule is granted except to the extent that it would direct that the Government's brief be filed less than 30 days from the date appellant's-petitioner's briefs are filed; the motion for advancement of hearing is denied without prejudice to renewal should circumstances change to warrant it; Tamm and Wilkey, CJ
(C) 6-2-75	4-Appellants' motion for advancement of hearing (p-2)

DATE	FILINGS—PROCEEDINGS
(K) 6-26-75	Per Curiam order granting appellants' motion for advancement of hearing; the Clerk is directed to schedule this case for oral argument as soon as the business of the Court permits; Counsel will be promptly notified of the scheduling of oral argument; Tamm and Wilkey, CJ
(R) 6-27-75	Clerk's order sua sponte, that oral argument in case nos. 75-1202, 75-1281 and 75-1282 will be held on Monday, July 14, 1975 at 10:00 A.M. in the Courtroom of the U.S. Court of Appeals for the District of Columbia Circuit, Fifth Floor, U.S. Courthouse, Washington, D.C.
(R) 7-14-75	Argued before Tamm, Leventhal and Robb, CJ.
8-11-75	Opinion for the Court filed by Circuit Judge Tamm. (IN XEROX FORM)
8-11-75	Dissenting opinion filed by Circuit Judge Robb.
8-11-75	Judgment reversing and remanding cases with instructions to enter appropriate relief for appellants. (n)
(K) 8-11-75	4-Appellant's motion for shortening from 21 to 10 days time within which mandate will issue (p-11)
(K) 8-15-75	4-Appellees' opposition to motion for shortening from 21 to 10 days within which mandate will issue (p-15)
(K) 8-15-75	4-Appellees' motion for stay of mandate pursuant to Rule 41(b) (p-15)
(G) 8-18-75	4-Appellants' opposition to motion for stay of mandate (p-18)
(C) 8-19-75	4-Appellees' reply to appellants' opposition to motion to stay mandate (p-19)

DATE	FILINGS—PROCEEDINGS

(R) 8-21-75 Per Curiam order that the motion for shortening time to issue mandate is denied; and the motion for stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment to September 15th; Tamm, Leventhal and Robb, CJ

(K) 8-29-75 4-Appellants' motion to modify stay order in aid of court's jurisdiction (p-29)

(K) 9-2-75 4-Appellees' (FEA, et al) motion to extend time to respond to motion to modify stay order (p-2) to September 12th

9-11-75 Printed copies of opinion of 8-11-75 issued this date.

(K) 9-11-75 Per Curiam order granting appellees' motion to extend time to respond to motion to modify stay order to September 12, 1975; Tamm, Leventhal and Robb CJ

(G) 9-11-75 Letter from appellees' advising that a writ of certiorari was filed on 9/10/75

(G) 9-12-75 4-Appellees' opposition to motion to modify stay order in aid of court's jurisdiction (m-12)

(G) 9-17-75 Notice of filing petition for certiorari in Supreme Court No. 75-382 on September 15, 1975

(G) 9-17-75 4-Appellants' reply to opposition to motion to modify stay order in aid of court's jurisdiction (m-17)

(R) 9-29-75 Per Curiam order that the motion of petitioners-appellants' to modify stay order in aid of the Court's jurisdiction is denied; Tamm, Leventhal and Robb, CJ

(R) 9-29-75 Certified copy of the above order sent to Clerk, U.S. District Court and a copy sent to Judge Pratt

DATE	FILINGS—PROCEEDINGS

*(C) 9-24-75 4-Appellee's supplemental response to appellants' motion to modify stay order (m-23) (Per RB)

(C) 9-29-75 4-Appellants' motion to amend motion to modify stay in aid of Court's jurisdiction (p-29)

(C) 9-29-75 4-Appellants' motion to reconsider this Court's order of Sept. 29 denying motion to modify stay order in aid of the Court's jurisdiction (p-29)

(G) 10-6-75 4-Appellees' opposition to motion to amend motion to modify stay in aid of court's jurisdiction and to reconsider motion to modify stay in aid of court's jurisdiction (m-6)

(K) 10-9-75 Per Curiam order that appellants' motion to amend motion to modify stay in aid of Court's jurisdiction is granted, and, that appellants' motion for reconsideration is denied; Tamm, Leventhal and Robb CJ

(K) 10-9-75 Certified copy of the above order sent to Clerk, U.S. District Court and a copy to Judge Pratt

(G) 11-10-75 Certified copy of order of Supreme Court granting certiorari in S.C. No. 75-382 on November 3, 1975

ALGONQUIN SNG, INC.
NEW ENGLAND POWER COMPANY
NEW BEDFORD GAS AND EDISON LIGHT COMPANY
CAMBRIDGE ELECTRIC LIGHT COMPANY
CANAL ELECTRIC COMPANY
MONTAUP ELECTRIC COMPANY
THE CONNECTICUT LIGHT AND POWER COMPANY
THE HARTFORD ELECTRIC LIGHT COMPANY
WESTERN MASSACHUSETTS ELECTRIC COMPANY
HOLYOKE WATER POWER COMPANY
ROBERT DRINAN
STATE OF MINNESOTA

vs.

1. WILLIAM E. SIMON
   Secretary of the Treasury

2. FRANK G. ZARB
   Administrator, Federal Energy
   Administration

3. FRANCINE NEFF
   Treasurer of the United States

DATE	NR.	PROCEEDINGS
1975		
Jan. 27		COMPLAINT, appearance. #2 ser 1-31-75. D.A. ser 1-28-75; #1, #3 & A.G. ser 1-29-75.
Feb. 3		MOTION by pltffs. for preliminary injunction; P & A's; table of cases; statement; affidavits (8); request for oral hearing; c/s 2/3/75.
Feb. 5		MOTION by pltfs. to consolidate with C.A. 75-0129; P&A's; c/s 2-5-75.
Feb. 12		ORDER granting motion of pltff to consolidate with C.A. 75-0129, consolidated hearing on motions for preliminary injunction set for February 21, 1975. (N) Pratt, J.

DATE	NR.	PROCEEDINGS
1975		
Feb. 21		MOTIONS of pltffs. for preliminary injunction, heard and denied. (Rep: Richard Mattson) Pratt, J.
Feb. 21		FINDINGS of Fact and conclusions of law and Order denying pltffs. motions for preliminary injunction. (N) Pratt, J.
Mar. 3		NOTICE of Appeal by pltff from Order entered February 21, 1975. $5.00 paid and credited to U.S. Copy mailed to U.S. Atty.
Mar. 7		COPY of Motion by pltff for consolidation of hearings on preliminary injunctions and merits and for entry of findings, conclusions of law and judgment; c/m 3-7-75.
Mar. 11		ORDER granting motion of pltff to treat hearing on preliminary injunction as hearing on the merits and the Findings of Fact, Conclusions of Law and Order of 2-21-75, shall constitute the Court's final judgment. (N) Pratt, J.
Mar. 13		TRANSCRIPT of proceedings, February 21, 1975; Rep: Richard L. Mattson; Court Copy. (Filed in C.A. 75-0129)
Mar. 13		NOTICE of appeal by pltff from Order entered March 11, 1975. Copy mailed to U.S. Atty.
Mar. 13		COST bond on appeal by pltff in the sum of Two Hundred fifty dollars cash, approved.
Mar. 25		PRELIMINARY record on appeal delivered to U.S.C.A.; receipt acknowledged (75-1282)
Apr. 8		RECORD on Appeal delivered to U.S.C.A.; receipt acknowledged.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1282

DATE	FILINGS—PROCEEDINGS

(C) 3-21-75 Certified Original Preliminary Record (No Transcripts)

(K) 3-24-75 4-Appellants' motion to consolidate case with #75-1281, #75-1202, #75-1206 (OkRB)

(K) 3-24-75 4-Appellants' motion for expedited briefing schedule, advancement of hearing and leave to file brief in xerox form (OK RB) (m-24)

(K) 4-2-75 4-Appellee's opposition to motion for expedited briefing schedule and response to motions for consolidation, advancement of hearing and leave to file xeroxed briefs and leave to file brief in excess of page limitation (Ok RB) (m-2)

(K) 4-8-75 Certified Original Record (no transcript) including 2 volumes of pleadings

(R) 4-18-75 Per Curiam order that nos. 75-1202, 75-1206 and 75-1281, and 75-1282 are consolidated for consideration on the merits; the motions for leave to file briefs in excess of page limitations are denied; the motion to expedite briefing schedule is granted except to the extent that it would direct that the Government's brief be filed less than 30 days from the date appellant's-petitioner's briefs are filed; the motion for advancement of hearing is denied without prejudice to renewal should circumstances change to warrant it; Tamm and Wilkey, CJ

(K) 8-29-75 4-Appellants' motion to modify stay order in aid of court's jurisdiction (p-29)

(K) 9-2-75 4-Appellees (FEA, et al) motion to extend time to respond to motion to modify stay order to September 12th (p-2)

DATE	FILINGS—PROCEEDINGS

9-11-75 Printed copies of opinion of 9-11-75 issued this date.

(K) 9-11-75 Per Curiam order granting appellees' motion to extend time to respond to motion to modify stay order to September 12, 1975; Tamm, Leventhal and Robb CJ

9-11-75 (G) Letter from appellees advising that a writ of certiorari was filed on 9/10/75

(G) 9-12-75 4-Appellees' opposition to motion to modify stay order in aid of court's jurisdiction (m-12)

(G) 9-17-75 Notice of filing petition for certiorari in Supreme Court No. 75-382 on September 15, 1975

(G) 9-17-75 4-Appellants' reply to opposition to motion to modify stay order in aid of court's jurisdiction (m-17)

(R) 9-29-75 Per Curiam order that the motion of petitioners-appellants to modify stay order in aid of the Court's jurisdiction is denied; Tamm, Leventhal and Robb, CJ

(R) 9-29-75 Certified copy of the above order sent to Clerk, U.S. District Court and a copy sent to Judge Pratt

*(C) 9-24-75 4-Appellee's' supplemental response to appellants' motion to modify stay order (m-23) (Per RB)

(C) 9-29-75 4-Appellants' motion to amend motion to modify stay in aid of Court's jurisdiction (p-29)

(C) 9-29-75 4-Appellants' motion to reconsider this Court's order of Sept. 29 denying motion to modify stay order in aid of the Court's jurisdiction (p-29)

DATE	FILINGS—PROCEEDINGS
(G) 10-6-75	4-Appellees' opposition to motion to amend motion to modify stay in aid of court's jurisdiction and to reconsider motion to modify stay in aid of court's jurisdiction (m-6)
(K) 10-9-75	Per Curiam order that appellants' motion to amend motion to modify stay in aid of Court's jurisdiction is granted and, that appellants' motion for reconsideration is denied; Tamm, Leventhal and Robb CJ
(K) 10-9-75	Certified copy of the above order sent to Clerk, U.S. District Court and a copy sent to Judge Pratt
(G) 11-10-75	Certified copy of order of Supreme Court granting certiorari in S.C. No. 75-382 on November 3, 1975

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1206

COMMONWEALTH OF MASSACHUSETTS and
MICHAEL S. DUKAKIS, Governor, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

DATE	FILINGS—PROCEEDINGS
(L) 2-27-75	4-Petitioners' petition for review of an order of the FEA
(L) 2-28-75	Certified copy of a petition for review of an order of the FEA was mailed to FEA
(R) 4-18-75	Per Curiam order that nos. 75-1202, 75-1206, 75-1281 and 75-1282 are consolidated for consideration on the merits; the motions for leave to file briefs in excess of page limitations are denied; the motion to expedite briefing schedule is granted except to the extent that it would direct that the Government's brief be filed less than 30 days from the date appellant's-petitioner's briefs are filed; the motion for advancement of hearing is denied without prejudice to renewal should circumstances change to warrant it; Tamm and Wilkey, CJ

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1202

ALGONQUIN SNG, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

DATE	FILINGS—PROCEEDINGS
(L) 2-27-75	4-Petitioners' petition for review of an order of the FEA
(L) 2-28-75	Certified copy of Petition for Review of an order of the FEA was mailed to FEA
(R) 4-18-75	Per Curiam order that nos. 75-1202, 75-1206, 75-1281 and 75-1282 are consolidated for consideration on the merits; the motions for leave to file briefs in excess of page limitations are denied; the motion to expedite briefing schedule is granted except to the extent that it would direct that the Government's brief be filed less than 30 days from the date appellant's-petitioner's briefs are filed; the motion for advancement of hearing is denied without prejudice to renewal should circumstances change to warrant it; Tamm and Wilkey, CJ

COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT AND MANDAMUS

(Filed January 27, 1975)

COMMONWEALTH OF MASSACHUSETTS AND
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State House
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Telephone 617-727-2200

and

STATE OF CONNECTICUT AND
ELLA GRASSO, Governor,
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and

STATE OF MAINE AND
JAMES B. LANGLEY, Governor
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and

STATE OF NEW JERSEY AND
BRENDAN T. BYRNE, Governor
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and

STATE OF NEW YORK AND
HUGH CAREY, Governor
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and

COMMONWEALTH OF PENNSYLVINIA AND
MILTON J. SHAPP, Governor
State Capital Annex
Harrisburg, Pennsylvania 17120
Telephone 717-787-3391

and

STATE OF RHODE ISLAND AND
PHILIP W. NOEL, Governor
Office of the Attorney General
Providence County Court House
Providence, Rhode Island
Telephone 401-831-6850

and

STATE OF VERMONT AND
THOMAS P. SALMON, Governor
Office of the Attorney General
c/o Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
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PLAINTIFFS

v.

WILLIAM E. SIMON,
Secretary of the Treasury of the
United States
Washington, D.C. 20220

and

FRANK G. ZARB,
Administrator of the
Federal Energy Administration
Washington, D.C.
DEFENDANTS

INTRODUCTORY STATEMENT

1. This is a civil action seeking to enjoin Defendants' execution of a new system of oil import license fees instituted by the Presidential Proclamation of January 23, 1975 Modifying Proclamation No. 3279 and seeking declaratory judgment of the invalidity of the same Presidential Proclamation. Plaintiffs seek relief essentially on the grounds that (1) the Proclamation asserts power beyond any statutory authority conferred by Congress; (2) the Proclamation violates the requirements for hearing, notice, investigation, and recommendations of the very statute under which it purports to act, Section 232 of the Trade Expansion Act of 1962, as amended Section 127(d) of the Trade Act of 1974, 19 U.S.C. 1862; and (3) the Proclamation violates the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, by Defendants' failure to prepare a considered and detailed environmental impact statement of the effects of the Proclamation.

SUBJECT MATTER JURISDICTION

2. The jurisdiction of this Court is provided by U.S.C. § 1331 (federal question); 28 U.S.C. § 1337 (regulation of interstate commerce); 28 U.S.C. § 1361 (action in the nature of mandamus); 28 U.S.C. § 2201-02 (declaratory judgment); 42 U.S.C. §§ 4321 *et seq.* (National Environmental Policy Act); and 5 U.S.C. §§ 701-06 (Administrative Procedure Act). The amount in controversy exceeds $10,000, exclusive of interest and costs.

PARTIES

3. Plaintiffs, all of whom will be gravely and irreparably injured by the actions complained of herein, are as follows:

a. The Commonwealth of Massachusetts is a sovereign state of the United States of America. The Commonwealth of Massachusetts is a major consumer of imported

petroleum and petroleum products and derivative energy products in the performance of its many governmental and proprietary functions and is a collector of revenues based upon sales of petroleum.

b. Michael S. Dukakis is Governor of the Commonwealth of Massachusetts and is a consumer of petroleum products.

c. The State of Connecticut is a state of the United States and sues on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders, as a user of petroleum products, as a collector of revenues based upon sales of petroleum products within its borders and as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the Defendants.

d. Ella Grasso is Governor of the State of Connecticut and is a consumer of petroleum products.

e. Plaintiff State of Maine is a state of the United States and, by Joseph E. Brennan, its Attorney General, sues on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders, as a user of petroleum products, as a collector of revenues based upon sales of petroleum products within its borders, and as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the Defendants.

f. James B. Longley is Governor of the State of Maine and is a consumer of petroleum products.

g. Plaintiff State of New Jersey is a state of the United States and sues on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders, as a user of petroleum products, as a collector of revenues based upon sales of petroleum products within its borders, and as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the Defendants.

h. Brendan T. Byrne is Governor of the State of New Jersey and is a consumer of petroleum products.

i. The State of New York is a sovereign state of the United States, with its capital and principal offices located in Albany, Albany County, New York. New York

brings this action (a) on its own behalf as a sovereign state and in its proprietary capacity as a consumer of petroleum products, (b) as representative for its local political subdivisions and (c) as *parens patriae* for its citizens and persons within its borders who have been and will be harmed by the wrongful acts of Defendants.

j. Hugh Carey is Governor of the State of New York and is a consumer of petroleum products.

k. The Commonwealth of Pennsylvania is a state of the United States and sues on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders, as a user of petroleum products, as a collector of revenues based upon sales of petroleum products within its borders, and as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the Defendants.

l. Milton J. Shapp is Governor of the Commonwealth of Pennsylvania and is a consumer of petroleum products.

m. The State of Rhode Island and Providence Plantations is a state of the United States and sues as a sovereign state, on behalf of itself, as it has responsibility for the health, safety and welfare of persons and citizens within its borders, as a user of petroleum products, as a collector of revenues based upon sales of petroleum products within its borders and for and on behalf of persons and citizens within its borders who have been and will be harmed by the wrongful acts of the Defendants.

n. Philip W. Noel is Governor of the State of Rhode Island and is a consumer of petroleum products.

o. The State of Vermont is a state of the United States and sues on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders, as a user of petroleum products, as a collector of revenues based upon sales of petroleum products within its borders, and as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the Defendants.

p. Thomas P. Salmon is Governor of the State of Vermont and is a consumer of petroleum products.

4. Defendant William E. Simon is Secretary of the Treasury of the United States. The Secretary of the Treasury is the administrative official most responsible for the actions challenged herein, including (a) preparation of the findings under Section 232 of the Trade Reform Act of 1974 upon which the challenged Proclamation is based and (b) general responsibility under the Proclamation for administration of the new oil import fee system and evaluation of its impact upon the economy.

5. Defendant Frank G. Zarb is Administrator of the Federal Energy Administration (hereafter the Administrator), Washington, District of Columbia. Under Section I of the Proclamation of January 23, 1975, the Administrator, as of February 1, 1975, is charged with the duty to issue allocations and licenses subject to fees as scheduled in the Proclamation on imports of crude oil, unfinished oils, and finished products. Under Section 2 of the Proclamation of January 23, 1975, the Administrator is charged with the duty to hold all such import license fees in a suspense account, from which he may draw for the repayment of certain refundable license fees. Also under Section 2 of the Proclamation of January 23, 1975, the Administrator is charged with the duty to deposit in the Treasury of the United States at the end of each fiscal year those balances remaining in the suspense account and not required to be reserved for license fee refunds.

6. Defendants Simon and Zarb are sued in their official capacities and any successors to their official positions are also sued herein.

STATEMENT OF FACTS

A. *The Trade Legislation and Executive Proclamation.*

7. The statutory source of the Mandatory Oil Import Program was a portion of the Trade Expansion Act, namely, 19 U.S.C. § 1862(b). That section (as most recently amended by the Trade Act of 1974 (Pub.L.93-618)) provides as follows:

"(b) Upon request of the head of any department or agency, upon application of an interested party, or on his own motion the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten or impair the national security, he shall so advise the President and the President shall take such action, and for such time as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten or impair the national security."

8. The forerunner of the above-quoted section was originally passed as section 7 of the Trade Agreements Extension Act of 1955 (69 Stat. 166 (1959)) and was amended by section 8 of the Trade Agreements Extension

Act of 1958 (72 Stat. 678 (1958)). A minor amendment was made when the statute was incorporated into the Trade Expansion Act of 1962, 19 U.S.C. 1862. The last amendments were made in the Trade Act of 1974 (Public Law 93-618, effective Jan. 3, 1975).

9. Despite many changes of form, the essential powers given the President have remained the same—namely to take action to adjust imports in the interests of national security. Section 1862(b) confers no power to impose duties or licenses subject to a fee. To the contrary, any assertion of tariff power or action in the nature of tariff is controlled by the Tariff Act of 1930, 19 U.S.C. 1202 *et seq.*, the Trade Expansion Act of 1962, and various sections of the Trade Act of 1974. These acts contain detailed procedures and provide explicit limitations for any action in the nature of tariff, the purpose of Section 1862(b) being to provide a different system of direct import quotas to be used in special, narrowly defined circumstances occasioned by the interests of national security.

10. The President administered § 1862(b) for eighteen years without ever claiming that it included a power to exact duties or license fees. Specifically, in 1959, President Eisenhower moved to limit imports of petroleum and petroleum products to this country by the promulgation of Proclamation No. 3279. (Text appears in annotations to 19 U.S.C. A. § 1862) Said Proclamation proceeded essentially by way of quota and was clearly within the wording of Section 1862 to "adjust imports." It set up a licensing system and provided that no imports of petroleum and petroleum products could be made except by issuance of a license by the Secretary of the Interior. It provided for determination by the Secretary of the levels of oil to be imported and for allocations by the Secretary of the amounts so permitted to be imported into various defined Districts and prescribed a maximum level of allocation for such districts. The Secretary was authorized to issue regulations by which import licenses were to be issued. Heavy reliance for such licenses was based upon the base period by applicants' use of petroleum and petroleum products. Accordingly, the Secretary

issued implementing regulations called Oil Import Regulation 32A C.F.R. Ch.X, which is still the governing regulation in this area.

11. The Mandatory Oil Import Program, though amended from time to time, continued in substantially the same form for a period of fourteen years, at which time shortages of oil in this country actuated President Nixon to remove license restrictions on petroleum and petroleum products in Exec. Proc. 4210 (text appears in annotations to 19 U.S.C.A. Sec. 1862). Under this proclamation, promulgated in April, 1973, a license was still required to import petroleum or petroleum products, but instead of basing such license rights on such factors as base period, any party was allowed to obtain a license. However, the President, for the first time, provided for a fee for such imports in accordance with detailed schedule, and a schedule of increase of such fees was also included.

12. On January 23, 1975, President Ford by Proclamation purported to institute a system of constraint on the import of oil based on the imposition of licenses subject to a fee, per barrel of oil. This "fee" would be $1.00 per barrel for oil and its products entered into the customs territory of the United States during the month of February 1975, $2.00 per barrel on imports entered during the month of March 1975, and $3.00 on imports entered on and after April 1, 1975. In addition, the Proclamation provided for certain rebates of portions of said "license fees," based on historic entitlements under prior programs relating to the imports and the allocation of oil.

13. Here again, the President did not pretend to treat the fees to be charged as duties under the Tariff Act of 1930. However, the Nixon and Ford two tier fee system, has created the largest monetary exaction in respect to imports in the history of the United States. All this monetary regulation has been imposed as an assertion of power under the authority to "adjust imports" contained in 19 U.S.C. Sec. 1862.

B. *Economic Injury to the Commonwealth of Massachusetts*

14. The execution of the Proclamation of January 23, 1975, will drastically increase the cost of imported crude oil and derivative energy products to the Commonwealth of Massachusetts, which is dependent upon imported crude oil for virtually all its energy requirements.

15. Direct energy costs to the state government as a consumer and proprietor would increase annually by over 2.7 million dollars. Moreover, the reduction of Massachusetts' gross state product would result in an annual reduction of state tax revenues in excess of 13.4 million dollars. The aggregate annual loss to the state budget, so far as measurable, will exceed 16.1 million dollars.

16. To cope with this severe impact on its budget, the Commonwealth will be forced either to increase taxes by special legislation or curtail services to its citizens. Either course of action will harm the Commonwealth irreparably, beyond any adequate remedy at law.

17. The increase of taxes will aggravate the departure of commerce and industry from the state and further aggravate unemployment in the Commonwealth, which already has the highest unemployment rate among the 48 mainland states of the nation.

18. A reduction of services, especially of human services to substantial segments of the population needful and otherwise helpless (the aged, the young, the physically infirm, the mentally ill and retarded) works irreparable harm since those services and benefits once lost are beyond restoration and compensation to both the Commonwealth and its citizens.

19. Further, the distribution of money damages, if conceivably calculable and traceable to the state government is a remedy of such complexity and duration as to be realistically incalculable and beyond reparation by any available remedies at law. Even if damages were conceivably calculable and traceable to the state government, the disruption to its legally mandated policies in the economic regulatory affairs and in the provision of human services outweigh any inconvenience caused by

delay to the defendants in the execution of the Proclamation of January 23, 1975, challenged herein.

C. *Injury to Other Plaintiffs*

20. The other Plaintiff States will suffer substantial economic injury in the same manner as alleged in paragraphs 14-19, but in varying amounts.

21. The individual Plaintiff Governors will suffer damage in the performance of their official duties as Chief Executive Officers of their respective States, by reason of their inability to implement previously adopted programs and will suffer economic damage as individual consumers of petroleum products.

D. *The Effect of the Proclamation Upon the Environment of the Plaintiff States*

22. The implementation of the system of license fees established pursuant to the Proclamation of January 23, 1975, is intended to reduce the quantity of foreign oil imported into the United States by a substantial amount. Reduction of imported oil will have a significant effect upon the human development of the plaintiff states. Specifically, the reduction directly restricts the supply of low-sulphur oil, the principal sources of which are Nigeria and Libya. Because sulphur oxides are a principal source of air pollution, low sulphur oil is an essential determinant of Plaintiff States' ability to comply with clean air standards under the Clean Air Act of 1970 (42 U.S.C. §§ 1857 et seq.). That Act requires the states to promulgate and implement state implementation plans carrying out the objectives of the Act and the regulations thereunder (42 U.S.C. § 1857(c); 40 C.F.R. §§ 50.4-50.5).

23. The import license fee program of the Proclamation of January 23, 1975 is intended to and may well have the effect of stimulating domestic exploration, extraction and processing of petroleum with significant effects on the human environment of Plaintiff States, including the following:

(a) construction and alteration of oil refineries and petrochemical plants, which are sources of air and water pollution;

(b) expanded off-shore oil drilling, with attendant incidence of oil spillage and pollution; and

(c) leasing of federal lands for oil shale development, with consequent environmental damage.

24. The import license fee program is intended to and may well have the effect of stimulating use of sources of energy alternative to oil, with significant effects upon the human environment of Plaintiff States, including the following:

(a) proliferation of nuclear power plants, with attendant risks of heat pollution and radiation pollution;

(b) stimulation of production of nuclear fuels adversely affecting the environment;

(c) increased strip mining for coal, with the accompanying damage to the environment; and

(d) increased burning of coal, with consequent air pollution from the production of sulphur oxides in considerably greater quantity than would result from oil or other fossil fuels.

25. The reduction in oil imports will also have a direct effect upon transportation problems for both foreign and domestic oil, with significant effects upon the human environment of Plaintiff States, including the following:

(a) changes in domestic surface transportation patterns increasing air and water pollution;

(b) changes in the level of oil tanker traffic increasing the potential for oil pollution of coastal waters and waterways.

26. There has been no public consideration, consultation or discussion of the environmental impact of the Proclamation of January 23, 1975; there has been no evaluation of alternatives to the proposed action of the Proclamation; there has been no evaluation of the short-term or long-term effects of the Proclamation.

27. The National Environmental Policy Act (NEPA) became effective on January 1, 1970. P.S. 91-190, 83

Stat. 852, 42 U.S.C. §§ 4321 *et seq.* The purposes of NEPA are, *inter alia*, "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. . . ." Section 2 of NEPA, 42 U.S.C. § 4321. Section 101(a) of NEPA contains a congressional declaration "that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ." Section 101(b) states:

> [i]n order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . (3) attain the widest range of beneficial uses of the environment without degredation, risk to health or safety, or other undesirable consequences . . .

28. To effectuate the Act's policies, section 102(1) of NEPA directs that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . ." Section 102(2) provides, *inter alia*:

> to the fullest extent possible . . . all agencies of the Federal Government shall—
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise which respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided in section 552 of Title 5, [United States Code] and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment . . . .

29. The Council on Environmental Quality ("CEQ") in 1973 issued Guidelines to assist federal agencies in complying with NEPA. Section 5 of the Guidelines provides in part:

5. *Actions included.* The following criteria will be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement:

(a) "Actions" include but are not limited to:

. . . .

(2) New and continuing projects and program activities . . . involving a Federal lease, permit, license, certificate or other entitlement for use;

(3) The making, modification or establishment of regulations, rules, procedures and policy.

30. Section 11 of the CEQ Guideline provides:

11. *Application of section 102(2)(C) procedure to existing projects and programs.*—To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970.

Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

31. The oil import license fee program is a continuing activity which involves the issuance of federal permits or licenses to import oil. Administration of the Program requires the making of policy, the issuance of regulations, and the devising of procedures.

32. Although the first oil import license fee of 18 cents per barrel was established by Presidential Proclamation 4210 of April 18, 1973, the increase of that fee to an

ultimate $3.00 per barrel as proposed by the Proclamation of January 23, 1975, is certainly an "incremental major action" to be shaped so as to minimize adverse environmental consequences. The CEQ has recognized that a broad "program statement" is often the most appropriate means under NEPA of assessing "the overall impact of a large-scale program." See CEQ Memorandum to Agencies:

"Recommendations for Improving Agency Procedures." May 16, 1972, pp. 17-18. No such efforts to comply with the letter and purpose of NEPA have been made by the defendants.

33. The oil import license fee program "significantly affect[s] the quality of the human environment" within the meaning of § 102(2)(C) of NEPA.

34. Defendants have failed to comply with the requirement of § 102(2)(C) of NEPA that they prepare and make available to the public a statement discussing in detail the environmental impacts of the oil import license fee program of the proclamation of January 23, 1975.

35. There are reasonable alternatives to the oil import license fee program. Defendants have failed to comply with the requirement of §§ 102(2)(D) and 102(2)(C)(iii) of NEPA that they "study, develop, and describe" these alternatives and prepare and make available to the public a detailed statement which discusses their environmental impacts in detail.

36. Defendants are officials of "agencies of the Federal Government" within the meaning of § 102(2)(C) of NEPA. Defendant Zarb, as Administrator of the Federal Energy Administration, is charged with primary responsibility for implementing the import license fee program of the Proclamation of January 23; he issues such licenses subject to the fees. Secretary of the Treasury William E. Simon is required by the Proclamation of January 23, 1975, to accept into the United States Treasury certain deposits of such fees held and then transmitted by Defendant Zarb. Defendants will execute the oil import license fee system. Defendant Zarb is the "responsible federal official" required by

§ 102(2)(C) of NEPA to prepare, circulate for comment, and make available to the public a statement describing in detail the environment impact of the Program and alternatives to it.

CAUSES OF ACTION

37. The Proclamation of January 23, 1975, which directs Defendants to impose a requirement of a license subject to a fee on the importation of oil in circumvention of the rigorous tariff provisions of the Trade Expansion Act of 1962, as amended, exceeds the narrow authority delegated by Congress under § 232(b) of the Trade Expansion Act of 1962, as amended, which is the authority claimed for its promulgation.

38. Since the power to lay and collect taxes is conferred exclusively on Congress by Article I, Section 8, clause 1 of the United States Constitution, the Proclamation of January 23, 1975, ordering the imposition of the license fee is in excess of the authority granted to the Executive Branch in the Constitution and constitutes a violation of the doctrine of Separation of Powers.

39. The Proclamation of January 23, 1975, which directs defendants to impose a requirement of a license subject to a fee on the importation of oil violates § 232(b) of the Trade Expansion Act of 1962, as amended, in that Defendant Simon has failed to make "recommendations for action" in terms contemplated by Congress.

40. The Proclamation of January 23, 1975, further violates § 232(b) of the Trade Expansion Act of 1962, as amended, in that Defendant Simon has failed to hold public hearings without offering any explanation, has failed to consult interested parties, and has disregarded the comprehensive process of deliberation contemplated by Congress in its amendment to § 232(b) enacted in 1974.

41. The Proclamation of January 23, 1975 further violates § 232(b) of the Trade Expansion Act of 1962, as amended, in that the investigation published by Defendant Simon on January 13, 1975 provides no basis for the action taken by the Proclamation, to wit: imposition

of a requirement of a license subject to a fee, thereby disregarding the intent of Congress in its 1974 Amendment to § 232(b).

42. Defendants have violated the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* by, *inter alia*, failing to prepare an Environmental Impact Statement.

43. The actions of Defendants complained of herein violate the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request that this Court:

44. (a) Enjoin Defendants from imposing the requirement of licenses subject to a fee pursuant to the Proclamation of January 23, 1975; or in the alternative,

(b) Enjoin Defendants from imposing the requirement of licenses subject to a fee pursuant to the Proclamation of January 23, 1975, until such time as Defendant Simon has held public hearings or has otherwise afforded Plaintiffs and other parties similarly situated an opportunity to present information and advice relevant to any action contemplated pursuant to § 232(b) of the Trade Expansion Act of 1962, as amended.

45. Enjoin Defendants from putting into operation the provisions of the Proclamation of January 23, 1975, until such time as Defendants have prepared an Environmental Impact Statement that satisfies the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et. seq.*

46. Declare that the Proclamation of January 23, 1975, exceeds the authority delegated by Congress under § 232(b) of the Trade Expansion Act of 1962, as amended, in that:

(a) it directs Defendants to impose a requirement of a license subject to a fee on the importation of oil in circumvention of the tariff provisions of the Trade Act of 1974;

(b) it lacks the underlying "recommendations for action" from Defendant Simon mandated by Congress;

(c) Defendant Simon has failed to hold public hearings without offering any explanation, has failed to consult interested parties, and has disregarded the comprehensive process of deliberation contemplated by Congress in its amendment to § 232(b) enacted in 1974;

(d) the investigation published by Defendant Simon on January 13, 1975 provides no basis for the action taken by the Proclamation, thereby disregarding the intent of Congress in its 1974 amendment to § 232(b).

47. Plaintiffs also request speedy completion of the Pleadings and such additional and further relief as the Court deems appropriate.

COMMONWEALTH OF MASSACHUSETTS, ET AL., PLAINTIFFS

v.

WILLIAM E. SIMON, Secretary of the Treasury, ET AL., DEFENDANTS

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

(Filed February 3, 1975)

Plaintiffs herein respectfully move this Honorable Court for the entry of a preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure, and in support thereof aver the following:

1. On January 23, 1975, President Ford issued Proclamation 4341, 40 Fed. Reg. 3965, modifying Proclamation 3279 relating to imports of petroleum and petroleum products issued by President Eisenhower on March 10, 1959, as amended (reprinted at Note to 19 U.S.C. § 1862 (Supp. 1974)). A true and correct copy of this Proclamation is attached hereto as Exhibit A.

2. One effect of the Proclamation of January 23, 1975, will be to require that importers of petroleum and petroleum products pay a supplemental license fee of $1.00 per barrel on imported petroleum or petroleum products beginning on February 1, 1975, $2.00 per barrel beginning on March 1, 1975, and $3.00 per barrel beginning on April 1, 1975, and continuing at a license fee rate of $3.00 per barrel for the indefinite future.

3. On January 14, 1975, Defendant Simon, as Secretary of the United States Treasury, submitted a Report to the President recommending "that appropriate action be taken to reduce imports" of petroleum and petroleum products. A true and correct copy of this Report, dated January 13, 1975, and the transmittal letter, dated January 14, 1975, is attached hereto as Exhibit B, along with a copy of an opinion letter of January 14, 1975, from

the Attorney General of the United States to the Secretary of the Treasury (Exhibit C, hereto).

4. According to the Report of the Department of the Treasury of January 13, 1975 (at page 10), 83% of the crude petroleum used on the East Coast in 1975 will be imported, and

> "The East Coast problem is especially difficult because of the high fuel oil demands in the New England area and the fact that approximately 98 percent of the residual fuel oil for PAD District 1 is imported as a refined product or made from imported crude."

5. Due to their heavy reliance on imported petroleum products, the plaintiff states will suffer an immediate economic injury of several million dollars, for each plaintiff state, by way of increased costs for the purchase of petroleum products and other energy sources, and by way of sharply decreased tax revenues, due to a reduction in their gross state product.

6. Unless Defendants are enjoined from imposing their unlawful license fee scheme, as described in Proclamation 4341, the plaintiff states and all of their citizens will suffer immediate and irreparable injury by way of increased unemployment, curtailed governmental services, and destruction of the environment, including pollution of the air, waterways and other limited natural resources.

7. The import license fees to be imposed as of February 1, 1975, pursuant to Proclamation 4341 are unlawful, in that: (a) the power to lay and collect taxes is conferred exclusively on Congress by Clause 1 of Article I, Section 8 of the United States Constitution; (b) Section 232(b) of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, does not contain any delegation by the Congress to the President of the power to impose the license fees complained of herein; and (c) in attempting to impose such license fees, Defendants are acting in circumvention of the tariff provisions of the Tariff Act of 1930, the Trade Expansion Act of 1962, and the Trade Act of 1974.

8. The license fee scheme which Defendants will impose on Plaintiffs, unless enjoined by this Court, has been adopted in violation of Section 232(b) of the Trade Expansion Act of 1962, as amended by Section 127(d) of the Trade Act of 1974, and Defendants' action thereunder are unlawful, in that: (a) Defendant Simon has failed and refused to hold public hearings, as required by the Act; (b) Defendant Simon has failed and refused to seek or consider the views and recommendations of appropriate individuals and agencies outside the Executive Branch, with respect to the propriety of and necessity for the license fee scheme, as required by the Act; and (c) Defendant Simon, in his Report to the President by transmittal letter of January 14, 1975, has failed to make "recommendations for action" to the President, as required by the Act.

9. In implementing their license fee scheme, Defendants have violated the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, in that such scheme will significantly affect the quality of the human environment, but Defendants have prepared no environmental impact statement, as required by Section 102 of NEPA, 42 U.S.C. § 4332.

10. Because the injury to be suffered by the plaintiff states will be irreparable, will begin immediately upon the effective date of the Proclamation (February 1, 1975), and will increase rapidly with the passage of time, it is imperative that Defendants be enjoined from implementing their unlawful license fee scheme at the earliest practicable time.

WHEREFORE, Plaintiffs respectfully request that this court:

(1) Schedule a hearing on their Motion for Preliminary Injunction forthwith;

(2) Enjoin Defendants from imposing a requirement of import license subject to a fee, pursuant to Proclamation 4341, pending determination of the merits;

(3) Enjoin Defendants from imposing a requirement of import license subject to a fee, pursuant to Proclamation 4341 until such time as Defendant Simon has

held public hearings or has otherwise afforded Plaintiffs and other parties similarly situated an opportunity to present information and advice relevant to any action contemplated pursuant to Section 232(b) of the Trade Expansion Act of 1962, as amended by Section 127(d) of the Trade Act of 1974;

(4) Enjoin Defendants from putting into operation the provisions of Proclamation 4341 until such time as Defendants have prepared an Environmental Impact Statement that satisfies the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

Pursuant to Local Rule 1-9(e), the Plaintiffs request oral hearing and an enlargement of time permitted for argument.

FRANCIS X BELLOTTI
Attorney General

Commonwealth of Massachusetts

Attorney for the Plaintiffs

NOTICE AND MOTION TO INTERVENE AS A PLAINTIFF

(Filed February 12, 1975)

COMMONWEALTH OF MASSACHUSETTS, ET AL., PLAINTIFFS,

vs.

WILLIAM E. SIMON, Secretary of the Treasury, and
FRANK G. ZARB, Administrator,
Federal Energy Administration, DEFENDANTS,

and

STATE OF MINNESOTA, by WENDELL R. ANDERSON,
its Governor, and WARREN SPANNAUS,
its Attorney General, PLAINTIFF-INTERVENOR.

TO: The parties above-named and their respective counsel.

PLEASE TAKE NOTICE that the State of Minnesota, by Wendell R. Anderson, its Governor, and Warren Spannaus, its Attorney General, hereby moves for an order of the Court granting it leave to intervene as a plaintiff in this action in order to assert the allegations set forth in its proposed complaint, a copy of which is hereto attached. Oral argument is not requested by counsel for any of the parties nor by intervenor. The grounds for this motion are: (1) the State of Minnesota has an interest in the subject-matter of this action which is not adequately represented by existing plaintiffs and is so situated that disposition of this action may as a practical matter impair or impede its ability to protect its interest; and (2) the claims of the State of Minnesota as set forth in its proposed complaint have questions of both law and fact in common with those of the main action herein.

This motion is made pursuant to Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure and

is based upon the proposed complaint and memorandum of points and authorities attached hereto.

Dated: February 7, 1975

WARREN SPANNAUS
Attorney General
State of Minnesota

By /s/ Peter W. Sipkins
PETER W. SIPKINS
Solicitor General

and /s/ Thomas R. Muck
THOMAS R. MUCK
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COMPLAINT IN INTERVENTION OF STATE OF MINNESOTA

(Filed February 14, 1975)

COMMONWEALTH OF MASSACHUSETTS, ET AL., PLAINTIFF,

vs.

WILLIAM E. SIMON, ET AL., DEFENDANTS,

and

STATE OF MINNESOTA, by WENDELL R. ANDERSON, its Governor, and WARREN SPANNAUS, its Attorney General, PLAINTIFF-INTERVENOR.

INTRODUCTION

This is a civil action seeking to enjoin defendants' execution of a new system of oil import license fees instituted by Presidential Proclamation 4341 of January 23, 1975, and seeking a declaratory judgment that said Presidential Proclamation is invalid.

Three separate bases exist for the maintenance of this action. *First*, the Proclamation asserts power beyond any statutory authority conferred by Congress. *Second*, the Proclamation was not issued in conformance with procedural requirements of the statute under which it purports to act, Section 232 of the Trade Expansion Act of 1962, as amended by Section 127D of the Trade Act of 1974, 19 U.S.C. § 1862. *Third*, the defendants' implementation of the Proclamation, without having first prepared a considered and detailed environmental impact statement of the effects of the Proclamation, violates the requirements of The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*

JURISDICTION

1. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1331 (federal question), 28 U.S.C. 1337 (regulation of interstate commerce), 28 U.S.C. 1361 (action in

the nature of mandamus), 28 U.S.C. 2201-02 (declaratory judgment), 42 U.S.C. 4321 *et seq.* (National Environmental Policy Act), and 5 U.S.C. 701-06 (Administrative Procedure Act). The amount in controversy exceeds $10,000, exclusive of interest and costs.

PLAINTIFF IN INTERVENTION

2. The State of Minnesota is a sovereign state of the United States of America, and, by its Governor, Wendell R. Anderson, and its Attorney General, Warren Spannaus, sues (a) as a major user of imported petroleum, petroleum products and derivative energy products in the performance of its many governmental and proprietary functions; (b) as a collector of revenues based upon sales of petroleum; and (c) as *parens patriae* on behalf of persons within its borders who have been or will be harmed by the wrongful acts of defendants. The State of Minnesota and its citizens are greatly dependent upon Canadian crude oil since all three of Minnesota's refineries, in addition to a Wisconsin refinery supplying Minnesota, utilize Canadian crude oil.

PARTIES DEFENDANT

3. Defendant William E. Simon is Secretary of the Treasury of the United States. The Secretary of the Treasury is the administrative official most responsible for the actions challenged herein, including (a) preparation of the findings under Section 232 of the Trade Act of 1974 upon which the challenged Proclamation is based, and (b) general responsibility under the Proclamation for administration of the new oil import fee system and evaluation of its impact upon the economy.

4. Defendant Frank G. Zarb is Administrator of the Federal Energy Administration (hereinafter the "Administrator"). Under Section 1 of Proclamation 4341, the Administrator, as of February 1, 1975, is charged with the duty to issue allocations and licenses subject to fees as scheduled in the Proclamation on imports of

crude oil, unfinished oils, and finished products. Under Section 2 of Proclamation 4341, the Administrator is charged with the duty to hold all such import license fees in a suspense account, from which he may draw for the re-payment of certain refundable license fees. Also under Section 2 of the Proclamation, the Administrator is charged with the duty to deposit in the Treasury of the United States at the end of each fiscal year those balances remaining in the suspense account and not required to be reserved for license fee refunds.

5. Defendants Simon and Zarb are sued in their official capacities.

FACTUAL BACKGROUND

A. *The Trade Legislation and Executive Proclamation.*

6. The statutory source of oil import programs is a portion of the Trade Expansion Act, namely, 19 U.S.C. 1862(b). That Section (as most recently amended by the Trade Act of 1974) (Pub. L. 93-618) provides as follows:

> b. Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject to such request, application or motion. The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such

> circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this Section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such action, and for such time as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

7. The forerunner of the above-quoted section was originally passed as Section 7 of the Trade Agreements Extension Act of 1955 (69 Stat. 166 (1959)) and was amended by Section 8 of the Trade Agreements Extension Act of 1958 (72 Stat. 678 (1958)). A minor amendment was made when the statute was incorporated into the Trade Expansion Act of 1962, 19 U.S.C 1862. The last amendments were made in the Trade Act of 1974 (Pub. L. 93-618, effective January 3, 1975).

8. Despite many changes of form, the essential powers given the President have remained the same—namely, to take action to adjust imports in the interests of national security. Section 1862(b), under which Proclamation 4341 was issued, confers no power to impose duties or licenses subject to a fee.

9. A power in the Executive Branch to impose duties or tariffs must rest on a clear delegation of authority from Congress since the authority to assess taxes, duties, imports and excises lies solely with Congress and not with the President. U.S. Const. art. I, § 8. Section 1862 (b) confers no such authority upon the President and was intended only to allow for a system of direct im-

port quotas to be used in specific, narrowly-defined circumstances occasioned by the interests of national security.

10. The power of the Executive Branch to create tariffs is controlled by the Tariff Act of 1930, 19 U.S.C. 1202, *et seq.*, the Trade Expansion Act of 1962, and various sections of the Trade Act of 1974. These Acts contain detailed procedures and provide explicit limitations for Congress' delegation of its powers to lay tariffs or take any actions in the nature of tariffs, in order that the delegation be properly governed.

11. None of the procedures for properly establishing a tariff was followed by the President in issuing Proclamation 4341. The Proclamation was wrongfully issued on the authority of Section 1862(b).

12. The President administered Section 1862(b) for 14 years without ever claiming that it included a power to affect duties or license fees. In 1959 President Eisenhower moved to limit imports of petroleum and petroleum products to this country by the promulgation of Proclamation No. 3279. Said Proclamation established a quota system, not a tariff or fee, and was clearly within the wording of Section 1862 to adjust imports. It established a licensing system and provided that no petroleum or petroleum products could be imported except by persons issued a license by the Secretary of the Interior.

13. The quota program provided for determination by the Secretary of the Interior of the levels of oil to be imported into various districts of the United States and for determinations by the Secretary of the amounts so permitted to be imported by each properly licensed importer into the districts.

14. The Secretary of the Interior was authorized to issue regulations by which import licenses were to be issued, and pursuant to said authority, the Secretary of the Interior issued Oil Import Regulation 32A, C.F.R. ch. X, which is still the governing regulation.

15. The oil import quota program was continued in substantially the same form, with only minor amendments, until April 19, 1973. On that date President Nixon issued Executive Proclamation 4210 which suspended the quota program and replaced it with a new oil import limitation scheme whereunder a license was still required to import oil but whereunder the amount of oil which might be imported by a licensee was not limited.

16. As to imports beyond certain prescribed levels, a "license fee" was to be charged the licensee. The Proclamation provided that between the date it became effective and 1980, *all* imported oil would gradually become subject to a license fee.

17. On January 23, 1975, President Ford issued Executive Proclamation 4341 which imposed on all petroleum products imported into the United States custom territory an additional flat rate fee of $1 per barrel after February 1, 1975, $2 per barrel after March 1, 1975, and $3 per barrel after April 1, 1975. The Proclamation also increased the per-barrel license fee on imports over specified levels. The President did not purport to treat the fees to be charged as duties under the Tariff Act of 1930.

18. The Nixon and Ford two-tier fee system has created the largest monetary exaction in respect to imports in the history of the United States. All this monetary regulation has been wrongfully imposed under the authority to adjust imports contained in 19 U.S.C. § 1862.

19. Proclamation 4341 was issued without public hearings having been held or interested parties otherwise having been afforded an opportunity to present information and advice relevant to an investigation by the Secretary of the Treasury relating to the effect of the importation of petroleum upon the national security. Section 232 of the Trade Expansion Act of 1962, as amended, requires the Secretary of the Treasury "if it is appropriate and after reasonable notice [to] hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." Section 127(d)(3), Pub. L. 93-618, January 3, 1975.

20. In light of the immense burden placed upon the economy of Minnesota by the aforesaid license fees, it was

not only appropriate but necessary that hearings be held so that the plaintiff in intervention, which is so vitally affected by said fees, could present its views.

21. The imposition of such fees without hearings was in contravention of both the letter and spirit of the statute and was an arbitrary and capricious act.

22. This action was particularly arbitrary and capricious in view of the finding of the Cabinet Task Force, created by the President on March 25, 1969, that restrictions on overland imports of oil from Canada were "non-security limitations" and its recommendation that limitations on imports of oil from Canada be ended. (See paragraphs 303 and 427b of the Cabinet Task Force report.)

B. *Economic Injury To Plaintiff In Intervention.*

23. The execution of Proclamation 4341 will drastically increase the cost of imported crude oil and derivative energy products to the State of Minnesota and its citizens, Minnesota being dependent upon imported crude oil for much of its energy requirements since all three Minnesota refineries operate almost exclusively on Canadian crude oil. Direct energy costs to Minnesota users of petroleum and petroleum products will increase annually by over 150 million dollars as a result of these fees.

24. Direct energy costs to the State of Minnesota as a consumer and proprietor will increase annually by over one million dollars. The fees would result in an annual reduction of state tax revenues in excess of seven million dollars. The aggregate annual loss to the State budget, so far as measurable, would exceed eight million dollars. To cope with this severe impact on its budget, the State will be forced either to increase taxes by special legislation or curtail services to its citizens. Either course of action will harm the State irreparably, beyond any adequate remedy at law.

25. The increase of taxes will aggravate the departure of commerce and industry from the State and further aggravate unemployment in the State.

26. A reduction of services to substantial segments of the population needful and otherwise helpless (the aged, the young, the physically infirm, the mentally ill and retarded) works irreparable harm since those services and benefits once lost are beyond restoration and compensation to both the State and its citizens.

27. Further, the damages which have been and will be incurred by the State as a result of the wrongful acts of defendants will be of such complexity and duration as to be realistically incalculable and beyond reparation by any available remedies at law.

C. *The Effect Of The Proclamation Upon The Environment Of The Plaintiff In Intervention*

28. The implementation of the system of license fees established pursuant to the Proclamation of January 23, 1975, is intended to reduce the quantity of foreign oil imported into the United States by a substantial amount. Reduction of imported oil will have a significant effect upon the human development of Minnesota.

29. Specifically, the reduction directly restricts the supply of low sulfur oil, the principal sources of which are Nigeria, Libya and Canada. Because sulfur oxide is a principal source of air pollution, low sulfur oil is an essential determinant of Minnesota's ability to comply with clean air standards under the Clean Air Act of 1970 (42 U.S.C. §§ 1857, *et seq.*).

30. That Act requires the states to promulgate and implement state implementation plans carrying out the objectives of the Act and the regulation thereunder. (42 U.S.C. § 1857(c); 40 C.F.R. §§ 50.4-50.5.)

31. The import license fee program Proclamation 4341 is intended to and may well have the effect of stimulating domestic exploration, extraction and processing of petroleum with significant effects on the human environment of Minnesota, including the following:

a. Construction and alteration of oil refineries and petro-chemical plants, which are sources of air and water pollution;

b. Leasing of federal lands for oil shale development, with consequent environmental damage.

32. The import license fee program is intended to and may well have the effect of stimulating use of sources of energy alternative to oil, with significant effects upon the human environment of Minnesota, including the following:

a. Poliferation of nuclear power plants, with attendant risk of heat pollution and radiation pollution;

b. Stimulation of production of nuclear fuels adversely affecting the environment;

c. Increased strip mining for coal, with the accompanying damage to the environment; and

d. Increased burning of coal with consequent air pollution from the production of sulfur oxide in considerably greater quantity than would result from oil or other fossil fuel.

33. The reduction of oil imports will also have a direct effect upon transportation problems for both foreign and domestic oil with significant effects upon the human environment of Minnesota, including the following:

a. Changes in domestic service transportation patterns increasing air and water pollution;

b. Changes in the level of oil tanker traffic increasing the potential for oil pollution of coastal waters and waterways.

34. There has been no public consideration, consultation or discussion of the environmental impact of the Proclamation of January 23, 1975; there has been no evaluation of alternatives to the proposed action of the Proclamation; there has been no evaluation of the short-term or long-term effects of the Proclamation.

35. The National Environmental Policy Act (NEPA) became effective on January 1, 1970. Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321, *et seq.*

36. The purposes of NEPA are *inter alia* "[t]o declare a national policy which will encourage productive

and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. . . ." Section 2 of NEPA, 42 U.S.C. § 4321.

37. Section 101(a) of NEPA contains a Congressional declaration ". . . that it is the continuing policy of the Federal Government . . . to use all practical means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony. . . ."

38. Section 101(b) states: "[i]n order to carry out the policy set forth in this Act it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . (3) "[a]ttain the widest range of beneficial uses of the environment without degradation, risk to health or safety or other undesirable and unintended consequences. . . ."

39. To effectuate the Act's policies, Section 102(1) of NEPA directs that:

> . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act. . . .

Section 102(2) provides, *inter alia*:

> . . . all agencies of the Federal Government shall—
>
> . . . .
>
> (C) Include in every recommendation or report on proposals for Legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) The environmental impact of the proposed action;

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) Alternatives to the proposed action;

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. . . .

. . . .

(D) Study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflict concerning alternative uses of available resources;

. . . .

40. The Council on Environmental Quality ("CEQ") in 1973 issued guidelines to assist federal agencies in complying with NEPA. Section 5 of the guidelines provides in part:

(5) *Actions Included.*

. . . .

(2) New and continuing project and program activities: directly undertaken by Federal agencies . . . or involving a Federal lease, permit, license certificate or other entitlements for use.

(3) The making, modification, or establishment of regulations, rules, procedures, and policy.

41. Section 13 of the CEQ guidelines provides:

Application of Section 102(2)(C) Procedure To Existing Projects and Programs.

Agencies have an obligation to reassess ongoing projects and programs in order to avoid or minimize adverse environmental effects. The section 102(2)(C) procedure shall be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. While the status of the

work and degree of completion may be considered in determining whether to proceed with the project, it is essential that the environmental impacts of proceeding are reassessed pursuant to the Act's policies and procedures and, if the project or program is continued, that further incremental major actions be shaped so as to enhance and restore environmental quality as well as to avoid or minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

42. The oil import license fee program is a continuing activity which involves the issuance of federal permits or licenses to import oil. Administration of the program requires the making of policy, the issuance of regulations and the devising of procedures.

43. Although the first oil import license fee of 18 cents per barrel was established by Presidential Proclamation 4210 of April 18, 1973, the increase of that fee to an ultimate $3 per barrel as proposed by the Proclamation of January 23, 1975, is certainly an "incremental major action" to be shaped so as to minimize adverse environmental consequences. The CEQ has recognized that a broad "program statement" is often the most appropriate means under NEPA of assisting "the over-all impact of a large-scale program." *See*, CEQ Memorandum to Agencies: "Recommendations for Improving Agency Procedures." May 16, 1972, pp. 17-18. No efforts to comply with the letter and purpose of NEPA have been made by the defendants prior to the effective date of the program created by Proclamation 4341.

44. The oil import license fee program "significantly affect[s] the quality of the human environment" within the meaning of Section 102(2)(C) of NEPA.

45. Defendants have failed to comply with the requirement of Section 102(2)(C) of NEPA that they prepare and make available to the public a statement discussing in detail the environmental impacts of the

oil import license fee program of Proclamation of January 23, 1975.

46. There are reasonable alternatives to the oil import license fee program. Defendants have failed to comply with the requirement of Sections 102(2)(D) and 102(2)(C)(iii) of NEPA that they "study, develop, and describe" these alternatives and prepare and make available to the public a detailed statement which discusses their environmental impact in detail.

47. Defendants are officials of "agencies of the federal government" within the meaning of Section 102(2)(C) of NEPA. Defendant Zarb, as Administrator of the Federal Energy Administration, is charged with primary responsibility for implementing the import license program of the Proclamation of January 23, 1975; he issues such licenses subject to the fees. Secretary of the Treasury William E. Simon is required by the Proclamation of January 23, 1975, to accept into the United States Treasury certain deposits of such fees held and then transmitted by defendant Zarb. Defendants will execute the oil import license fee system. Defendant Zarb is the "responsible federal official" required by Section 102(2)(C) of NEPA to prepare, circulate for comment, and make available to the public a statement describing in detail the environmental impact of the program and the alternatives to it.

48. Plaintiff has no speedy or adequate remedy at law.

COUNT ONE

49. Realleges the allegations contained in paragraphs 1 through 48 herein.

50. The President issued Executive Proclamation 4341, imposing a per-barrel fee of up to $3 on petroleum imports allegedly pursuant to the authority granted him by Congress under Section 232(b) of the Trade Expansion Act of 1962.

51. Said Section only authorizes the President to impose direct import quotas in the interests of national security and not a fee or tariff.

52. The President exceeded his authority under Section 232(b) of the Trade Expansion Act of 1962 and said Proclamation is therefore invalid.

COUNT TWO

53. Realleges the allegations contained in paragraphs 1 through 48 and 50 herein.

54. Executive Proclamation 4341 is a clear attempt to circumvent the requirements for tariff modification in 19 U.S.C. § 1346 and § 1351, and is therefore invalid.

COUNT THREE

55. Realleges the allegations contained in paragraphs 1 through 48 and 50 herein.

56. Since the power to lay and collect taxes is conferred exclusively on Congress by Art. I, § 8, Clause 1 of the United States Constitution, Executive Proclamation 4341 ordering the imposition of the per-barrel fee is in excess of the authority granted to the Executive Branch in the Constitution and constitutes a violation of the doctrine of separation of powers.

COUNT FOUR

57. Realleges the allegations contained in paragraphs 1 through 48 and 50 herein.

58. Executive Proclamation 4341 violates Section 232(b) of the Trade Expansion Act of 1962, as amended, in that defendant Simon has failed to make "recommendations for action" in terms contemplated by Congress.

COUNT FIVE

59. Realleges the allegations contained in paragraphs 1 through 48 and 50 herein.

60. Executive Proclamation 4341 further violates Section 232(b) of the Trade Expansion Act of 1962, as amended, in that defendant Simon has failed to hold public hearings without offering any explanation, has

failed to consult interested parties, and has disregarded the comprehensive process of deliberation contemplated by Congress in its amendment to Section 232(b) enacted in 1974.

COUNT SIX

61. Realleges the allegations contained in paragraphs 1 through 48 and 50 herein.

62. Executive Proclamation 4341 further violates Section 232(b) of the Trade Expansion Act, as amended, in that the investigation published by defendant Simon on January 23, 1975, provides no basis for the action taken by the Proclamation, to wit, imposition of a per-barrel fee, thereby disregarding the intent of Congress in its 1974 amendment to Section 232(b).

COUNT SEVEN

63. Realleges the allegations contained in paragraphs 1 through 48 and 50 herein.

64. Executive Proclamation 4341 violates the requirements of The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, in that the defendants have not prepared and made available to the public a considered and detailed environmental impact statement of the effects of said Proclamation.

COUNT EIGHT

65. Realleges the allegations contained in paragraphs 1 through 48 and 50 herein.

66. Executive Proclamation 4341 further violates the requirements of The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, in that the defendants have not studied, developed, described, and made available to the public appropriate alternatives to said Proclamation.

RELIEF REQUESTED

WHEREFORE, plaintiff respectfully prays that this Court issue its order and judgment:

I. Declaring that Executive Proclamation 4341 is an invalid attempt to exercise the authority delegated to the President by Congress under Section 232(b) of the Trade Expansion Act of 1962, as amended, in that:

A. Section 232(b) does not empower the President to impose fees or tariffs;

B. Said Proclamation directs defendants to impose a per-barrel fee on imported petroleum products in circumvention of the tariff provisions of the Trade Expansion Act of 1962, as amended;

C. Defendant Simon did not comply with the requirements of Section 232(b) that he hold hearings and consult interested parties before requesting that the President take action under Section 232(b);

D. The investigation published by defendant Simon on January 13, 1975, provides no basis for the action taken by said Proclamation, thereby violating Section 232(b);

E. Said Proclamation was not issued pursuant to recommendations for action made by defendant Simon as required by Section 232(b);

II. Enjoining defendants from imposing per-barrel fees on imported petroleum products under Executive Proclamation 4341; or, in the alternative,

III. Enjoining each of the defendants and his successors from imposing per-barrel fees on imported petroleum products pursuant to Executive Proclamation 4341 until such time as:

A. Defendant Simon has complied with the requirements of Section 232(b) by holding hearings and affording interested parties, including plaintiff, opportunity to present information on the matter, by issuing a report on his findings and by making recommendations for action; and

B. Defendants have prepared an environmental impact statement as required by the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

Dated: February 7, 1975.

WARREN SPANNAUS
Attorney General
State of Minnesota

By /s/ Peter W. Sipkins
Solicitor General

and /s/ Thomas R. Muck
Special Assistant
Attorney General

and /s/ Thomas H. Jensen
Special Assistant
Attorney General

160 State Office Building
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Telephone: (612) 296-2961

Attorneys for
Plaintiff-Intervenor

NOTICE AND MOTION FOR PRELIMINARY INJUCTION

[Filed February 14, 1975]

COMMONWEALTH OF MASSACHUSETTS,
ET AL., PLAINTIFFS,

vs.

WILLIAM E. SIMON,
Secretary of the Treasury, and
FRANK G. ZARB,
Administrator, Federal Energy
Administration,
DEFENDANTS,

and

STATE OF MINNESOTA, by
WENDELL R. ANDERSON,
its Governor, and
WARREN SPANNAUS,
its Attorney General,
PLAINTIFF-INTERVENOR.

TO: The parties above-named and their respective counsel.

PLEASE TAKE NOTICE that on February 21, 1975, at 9:30 a.m., or as soon thereafter as counsel can be heard, the State of Minnesota, plaintiff-intervenor herein, will move for an order of the Court as follows: (1) enjoining the implementation of Presidential Proclamation 4341 pending a decision on the merits of this action; or, (2) enjoining the implementation of said Proclamation (a) until such time as public hearings are conducted by the Secretary of the Treasury pursuant to § 232 of the Trade Expansion Act of 1962, as amended; or, (b) until responsible agency officials file an acceptable environmental impact statement pursuant to the provisions of 42 U.S.C.A. § 4332(c)(i)-(v) (1973).

The grounds for this motion are: (1) plaintiff-intervenor can demonstrate a probability of ultimate success on the merits of this action; (2) irreparable harm will be suffered by plaintiff-intervenor and its citizens if this motion is denied; (3) no appreciable harm will be suffered by defendants if the equitable relief requested is granted; and (4) the public interest will be served by issuance of a preliminary injunction herein.

This motion is brought pursuant to Federal Rule of Civil Procedure 65 and is based upon all of the files and records of the proceedings herein, the attached memorandum of law and the affidavits of the Honorable Wendell R. Anderson and Dr. James Carter.

Dated: February 13, 1975

WARREN SPANNAUS
Attorney General
State of Minnesota

PETER W. SIPKINS
Solicitor General

THOMAS R. MUCK
Special Assistant
Attorney General

By /s/ Thomas H. Jensen
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Attorneys for
Plaintiff-Intervenor

COMPLAINT FOR MANDAMUS, INJUNCTIVE, DECLARATORY AND OTHER RELIEF

[Filed January 27, 1975]

ALGONQUIN SNG, INC.
1284 Soldiers Field Road
Boston, Massachusetts 02135
617-254-4050

NEW ENGLAND POWER COMPANY
20 Turnpike Road
Westboro, Massachusetts 01581
617-366-9011

NEW BEDFORD GAS AND EDISON LIGHT COMPANY
693 Purchase Street
New Bedford, Massachusetts 02740
617-996-8211

CAMBRIDGE ELECTRIC LIGHT COMPANY
46 Blackstone Street
Cambridge, Massachusetts 02139
617-661-1600

CANAL ELECTRIC COMPANY
130 Bishop Richard Allen Road
Cambridge, Massachusetts 02139
617-881-1301

MONTAUP ELECTRIC COMPANY
Riverside Avenue
Somerset, Massachusetts 02726
617-678-5283

THE CONNECTICUT LIGHT AND POWER COMPANY
Selden Street
Berlin, Connecticut 60101
203-666-2431

THE HARTFORD ELECTRIC LIGHT COMPANY
176 Cumberland Avenue
Wethersfield, Connecticut 06101
203-249-5711

WESTERN MASSACHUSETTS ELECTRIC COMPANY
174 Brush Hill Avenue
West Springfield, Massachusetts 01089
413-785-5871

HOLYOKE WATER POWER COMPANY
One Canal Street
Holyoke, Massachusetts 01040
413-536-5520

and

ROBERT DRINAN
140 Commonwealth Avenue
Boston, Massachusetts 02216
617-969-0100, PLAINTIFFS,

v.

WILLIAM E. SIMON
Secretary of the Treasury
United States Treasury Department
15th & Pennsylvania Avenue, N.W.
Washington, D.C. 20220

FRANK G. ZARB
Administrator, Federal Energy Administration
Federal Energy Administration
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20461
202-655-4000

and

FRANCINE NEFF
Treasurer of the United States
United States Treasury Department
15th & Pennsylvania Avenue, N.W.
Washington, D.C. 20220

DEFENDANTS.

Nature of the Claim

1. This action is to compel by mandamus the issuance of fee-free licenses authorizing the importation of petroleum or petroleum products and to enjoin the collection of fees assessed pursuant to Executive Proclamation No. 3279, as amended, (Exec. Proc. 3279) and to have said Proclamation declared illegal and unenforceable to the extent that it requires payment of fees for licenses for importation of petroleum and petroleum products into the United States.

Jurisdiction

2. The jurisdiction of this Court is based on 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 1331, 1332, 1337, 1361, 1651, 2201, and 2202. The amount in controversy in this case exceeds $10,000 exclusive of interest and costs.

Parties Plaintiff

3. The corporate plaintiffs are a natural gas company and certain public utilities serving the public in the northeast section of the United States, and are dependent in large measure upon imported petroleum and petroleum products for the production and distribution of electric power and synthetic gas. The names of the plaintiffs and the states under the laws which they were organized and exist follow: Algonquin SNG, Inc. (Algonquin), Delaware; New England Power Company (New England), Massachusetts; New Bedford Gas and Edison Light Company (New Bedford), Massachusetts; Cambridge Electric Company (Cambridge), Massachusetts; Canal Electric Company (Canal), Massachusetts; and, Montaup Electric Company (Montaup), Massachusets. The Connecticut Light and Power Company (CL&P), Connecticut; The Hartford Electric Light Company (HELCO), Connecticut; Western Massachusetts Electric Company (WMEC), Massachusetts; and, Holyoke Water Power Company (Holyoke), Massachusetts.

4. Plaintiff, Robert F. Drinan, S.J., is a member of Congress, representing the Fourth Congressional District of Massachusetts and maintains his residence at 140 Commonwealth Avenue, Boston, Massachusetts as well as a year-round district office in Walthan, Massachusetts. Congressman Drinan is a consumer of gas and electricity in the City of Boston, Massachusetts, his established residence, and in Waltham, Massachusetts.

Parties Defendant

5. Defendant Zarb is the Administrator of the Federal Energy Administration, is responsible for the implementation, effectuation, and enforcement of Exec. Proc. 3279, and, with Defendants Simon and Neff, is responsible for the collection of the license fees imposed pursuant to Exec. Proc. 3279.

6. Defendant Simon is the Secretary of the Treasury and with Defendants Zarb and Neff is responsible for the collection of the license fees imposed pursuant to Exec. Proc. 3279.

7. Defendant Neff is the Treasurer of the United States and, with Defendants Zarb and Simon, is responsible for the collection of the license fees imposed pursuant to Exec. Proc.

The Fee System under Exec. Proc. 3279

8. Executive Proclamation No. 4210, effective May 1, 1973, amended Executive Proclamation 3279 and instituted, *inter alia*, the present license fee system replacing the Mandatory Oil Import Program (MOIP) and modifying the "method of adjusting imports of petroleum and petroleum products." As was provided in the MOIP, no petroleum or petroleum products may be imported into the United States without a license issued by the FEA (Exec. Proc. 3279, § 1(a)). The modification consisted of "shifting to a system whereby fees for licenses" concerning imports were to be charged. MOIP had been established on March 10, 1959 by Exec. Proc. 3279 under the authority of Section 2 of the Act of July 1, 1954, as amended, 72 Stat. 678 (19 U.S.C. § 1352), presently 19 U.S.C. § 1862.

9. Exec. Proc. 3279 is implemented and enforced by the Defendant FEA Administrator. See also, Federal Energy Administration Act of 1974, Public Law 93-275; Ex. Order 11790, effective June 27, 1974. The FEA Administrator is directed to issue allocations and licenses subject to fees, on imports of crude oil, unfinished oils and finished products.

10. Pursuant to the authority of Executive Proclamation 4210, issued April 18, 1973, the FEA Administrator issued regulations implementing that Executive Proclamation and prescribing procedures by which licenses were to issue to qualified applicants. (May 1, 1973 38 F.R. 10727).

11. By Executive Proclamation signed by the President January 23, 1975, Executive Proclamation 3279 was further amended to continue in effect the schedule of fees instituted in accordance with Exec. Proc. 4210 and, in addition, provided for a different and higher schedule of fees for the issuance of licenses for the importation of petroleum and petroleum products.

12. The Proclamation amended subparagraph (1) of paragraph (a) of section 3 to provide that licenses shall require *inter alia*, that with respect to imports of crude oil and natural gas products, over and above the levels established in Section 2 of Exec. Proc. 3279, fees shall be $0.21 per barrel. With regard to imports of motor gasoline, unfinished oils and all other finished products (except ethane, propane, butanes and asphalt) over and above the levels of imports established in Section 2 Exec. Proc. 3279 fees shall be $0.63 per barrel.

13. Additionally, with respect to imports of crude oil, natural gas products, unfinished oils, and other finished products (except ethane, propane, butanes, and asphalt) entered into the customs territory of the United States on or after February 1, 1975 there shall be an additional fee per barrel of $1.00 rising to $2.00 on imports entered on or after March 1, 1975 and to $3.00 on imports entered on or after April 1, 1975. For certain imports refunds of a portion of the $1.00, $2.00, or $3.00 fee may be made to the importer of record, pursuant to Section 3(a)(1)(viii) of Exec. Proc. 3279.

14. Applications for allocations and licenses for imports subject to a fee must be accompanied by either a certified or cashier's check for the full amount of the fee payable to the order of the defendant Treasurer of the United States or accompanied by a bond for not less than the amount of the fee with a surety which is on the list of acceptable sureties on Federal bonds maintained by

the Bureau of Government Financial Operations, Department of the Treasury. The bond must be conditioned upon payment to the order of the Treasurer of the United States, within the last day of the month following the month in which the imports were released from customs custody or entered or withdrawn from warehouses, whichever occurs first, unless another time frame is set by the Administrator. If the face value of the bond is reduced below the amount of outstanding liability or if the bond is terminated the Administrator is directed immediately to revoke all licenses issued pursuant to the bond. Exec. Proc. 3279, § 3(b)).

15. The cash fees received by the Administrator are held by him in a suspense account and may be drawn upon by the Administrator for the payment of refundable license fees. Balances remaining and not required to be reserved are to be deposited at the end of each fiscal year in the Treasury in the Treasury of the United States administered by the defendant Secretary of the Treasury, and credited to miscellaneous receipts. (Exec. Proc. 3279, § 3(a)(1)).

Irreparable Damage to Plaintiffs

16. Plaintiff, Algonquin, owns and operates a synthetic gas plant in Freetown, Massachusetts. This plant uses naphtha, which is a petroleum product under Exec. Proc. 3279, as feedstock in the manufacture of synthetic gas, a large portion of which feedstock is imported by Algonquin and is subject to the licensing and license fees imposed by Exec. Proc. 3279. As a result, Algonquin has paid, and would continue to pay substantial license fees as an importer of such feedstock. If Algonquin is to meet its customer's normal requirements, it will import over one million barrels of naphtha within the next three months and over two million barrels of naphtha during calendar year 1975. A fee-free license has been applied for by Algonquin and has been denied in large part.

17. The remaining corporate plaintiffs are the owners of numerous fossil fueled electric generating facilities in Massachusetts, Connecticut and other States. Said generating facilities require large amounts of residual fuel

oil as an energy source, and residual fuel oil is a petroleum product under Exec. Proc. 3279. Plaintiffs have purchased, and are continuing to purchase, substantial amounts of such residual oil from importers who are subject to licensing and license fees imposed by Exec. Proc. 3279, and, in the case of New England, from those who purchase from such importers, and these license fees are, and will be, passed on to said plaintiffs in the form of higher fuel prices. A fee-free license has been applied for by New England and has been denied.

18. Plaintiffs CL&P, HELCO, WMEC and Holyoke, all subsidiaries of Northeast Utilities, a public utility holding company, in the aggregate, consumed 21.5 million barrels of imported residual fuel oil in 1974 and will consume approximately that amount in 1975.

19. Plaintiffs New England, New Bedford, Cambridge, Canal, and Montaup will purchase approximately the following quantities of residual fuel oil within the next three months and during the remainder of Calendar Year 1975:

	Next Three Months	CY1975
New England	2,900,000 Barrels	17,600,000 Barrels
New Bedford	163,572	599,764
Cambridge	241,000	883,664
Canal	1,465,300	5,372,780
Montaup	296,000	1,250,000

20. The proposed increase in license fees will substantially increase the cost of fuel to Plaintiffs, will require that rates be increased to customers in the face of increasing public resistance in rate matters and, as to practically all Plaintiffs will create an additional lag in recovery of their costs through revenues with resulting adverse effect on working capital and the cost of capital, and will cause serious damage to relationships with customers. Algonquin will be compelled to absorb the increased costs of fuel and will be unable to pass them along except after extensive administrative proceedings before the Federal Power Commission. The increase in rates by Plaintiffs will cause severe damage and personal hardship to Plaintiffs' customers.

21. Plaintiff Drinan has been injured and shall continue to be injured by the illegal fee system implemented, effectuated, and enforced by the Administrator of the FEA and collected by the Administrator of the FEA, and the Treasurer of the United States, and the Secretary of the Treasury, pursuant to Exec. Proc. 3279, since these illegal actions have resulted and will continue to result in added costs to him as a result of increased utility rates.

22. Because of the imposition and collection of the illegal fees pursuant to Exec. Proc. 3279, the Plaintiffs have suffered and will continue to suffer immediate and irreparable injury, for which there exists no adequate remedy at law.

Illegal Nature of the Licensing Fees

23. The license fees established by Exec. Proc. 3279 are in circumvention of the duty system. Under Article 1, Section 8, Clause 1, of the United States Constitution, the Congress has the sole power to lay and collect duties and when it exercises that power, all such duties must be uniform throughout the United States. The fees established by Exec. Proc. 3279, do not operate with geographical uniformity, inasmuch as a given importer's obligation to pay license fees may vary depending upon the section of the country into which the particular importation occurs. Exec. Proc. 3279, § (a). These fees are therefore illegal.

24. Exec. Proc. 3279, was issued allegedly pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, (19 U.S.C. § 1862). Neither the Trade Expansion Act of 1962, as amended, nor any other Act of Congress, nor the Constitution itself, delegates to the President the power to establish or require the establishment of license fees such as those established by and pursuant to Exec. Proc. 3279.

25. The attempt by the President to restrict importation of petroleum and petroleum products by imposing license fees thereon, absent specifically delegated authority to do so, exceeds his authority and violates Article 1, Section 8, Clause 3 of the United States Constitution, which confers on the Congress the sole right to regulate commerce with foreign nations and among the several States.

26. The Executive Proclamation issued January 23, 1974, further amending Exec. Proc. 3279, was issued without public hearings having been held or interested parties otherwise having been afforded an opportunity to present information and advice relevant to an investigation by the Secretary of the Treasury relating to the effect of the importation of petroleum upon the national security. Section 232 of the Trade Expansion Act of 1962, as amended, requires the Secretary of the Treasury "if it is appropriate and after reasonable notice [to] hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." Section 127(d)(3), P.L. 93-618, January 3, 1975.

27. In light of the immense burden placed upon the economy of the northeastern section of the U.S. by the aforesaid license fees, not all of which can be foreseen by these particular Plaintiffs, it was not only appropriate but necessary that hearings be held so that the Plaintiffs, which are so vitally affected by said fees, could present their views. The imposition of such fees without hearings therefore was in contravention of both the letter and spirit of the statute and was an arbitrary and capricious act.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray that this Court:

1. Enjoin the Defendant Administrator of the Federal Energy Administration from further implementing, effectuating and enforcing Executive Proclamation No. 3279, as amended, to the extent that it imposes and will impose fees for licenses for the importation of petroleum and petroleum products into the United States, and further enjoin Defendants Administrator of the Federal Energy Administration, Secretary of the Treasury, and the Treasurer of the United States from collecting such fees.

2. Issue a declaratory judgment declaring and adjudicating that Executive Proclamation No. 3279, as amended, is unlawful to the extent that it imposes and will impose fees for licenses for the importation of petroleum and petroleum products into the United States.

3. Order the Defendant Administrator of the Federal Energy Administration to issue import licenses without requiring the payment of fees for these licenses for the importation of petroleum and petroleum products into the United States.

4. If this Court should uphold the legality of Executive Proclamation No. 3279, as amended, enjoin the Defendants from collecting any of the licensing fees described herein until such time as hearings have been held, and findings made, as provided by statute.

5. Order speedy completion and filing of the pleadings.

6. Grant such further and additional relief to plaintiffs as may be necessary and appropriate.

Respectfully submitted,

RICH, MAY & BILODEAU

By /s/ Michael F. Donlan
One State Street
Boston, Massachusetts 02109
617-742-6500

CONNOLE AND O'CONNELL

By /s/ William R. Connole
#52845

and /s/ Ernest C. Baynard, III
#17186

One Farragut Square South
Washington, D.C. 20006
202-347-8300

Attorneys for Plaintiffs

[Filed February 3, 1975]

ALGONQUIN SNG, INC.,
NEW ENGLAND POWER COMPANY,
NEW BEDFORD GAS AND EDISON LIGHT COMPANY,
CAMBRIDGE ELECTRIC LIGHT COMPANY,
CANAL ELECTRIC COMPANY,
MONTAUP ELECTRIC COMPANY,
THE CONNECTICUT LIGHT AND POWER COMPANY,
THE HARTFORD ELECTRIC LIGHT COMPANY,
WESTERN MASSACHUSETTS ELECTRIC COMPANY,
HOLYOKE WATER POWER COMPANY,
and
ROBERT DRINAN, PLAINTIFFS

v.

WILLIAM E. SIMON,
FRANK G. ZARB,

and

FRANCINE NEFF, DEFENDANTS

MOTION FOR PRELIMINARY INJUNCTION AND OTHER PRELIMINARY RELIEF

Plaintiffs hereby move this Court for a preliminary injunction and an order in the nature of mandamus in the form attached hereto.

This motion is based on the ground that immediate and irreparable injury, loss and damage will result to plaintiffs unless the motion is granted, as more particu-

larly appears from the Memorandum of Points and Authorities herewith, together with accompanying exhibits and affidavits.

Respectfully submited,

RICH, MAY & BILODEAU

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617-742-6550

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[Filed February 5, 1975]

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NEW BEDFORD GAS AND EDISON LIGHT COMPANY,
CAMBRIDGE ELECTRIC LIGHT COMPANY,
CANAL ELECTRIC COMPANY,
MONTAUP ELECTRIC COMPANY,
THE CONNECTICUT LIGHT AND POWER COMPANY,
THE HARTFORD ELECTRIC LIGHT COMPANY,
WESTERN MASSACHUSETTS ELECTRIC COMPANY,
HOLYOKE WATER POWER COMPANY,
and
ROBERT DRINAN, PLAINTIFFS

v.

WILLIAM E. SIMON,
FRANK G. ZARB,

and

FRANCINE NEFF, DEFENDANTS

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larly appears from the Memorandum of Points and Authorities herewith, together with accompanying exhibits and affidavits.

Respectfully submitted,

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202-347-8300

Attorneys for Plaintiffs

Affidavit of William D. Jaques

I, William D. Jaques, of 6 Robert Road, Reading, Massachusetts, being duly sworn, depose and say as follows:

1. I am Vice President of Algonquin SNG, Inc. ("Algonquin SNG"), a Delaware corporation, and also of its parent company Algonquin Gas Transmission Company ("Algonquin Gas"), a Delaware corporation (which owns 100% of Algonquin SNG), with a principal place of business at 1284 Soldiers Field Road, Boston, Massachusetts.

2. Algonquin SNG owns and operates a synthetic natural gas plant in Freetown, Massachusetts, with a capacity of 120,000 Mcf of synthetic gas per day. All of its output is sold to Algonquin Gas which is one of two major gas pipelines in New England. Algonquin Gas is a natural gas company subject to the jurisdiction of the Federal Power Commission and sells gas solely at wholesale, being the sole source of natural gas for cities such as Providence, Rhode Island; New Haven and New London, Connecticut; and Boston, Fall River, Cambridge and New Bedford, Massachusetts. In order to manufacture synthetic natural gas, it is necessary to use a naphtha feedstock and Algonquin SNG, in order to operate its plant, needs to import approximately half of its winter requirements; namely, to import 2,250,000 barrels during the wintertime. Algonquin SNG requires imports of over 800,000 barrels for the remainder of the winter period ending April 15, 1975.

3. Imports of naphtha are subject to license fees under the President's import fee program. Algonquin SNG has no suppliers with a base period and, hence, has no way of getting fee-free imports under the license fee program without being granted them by the Federal Energy Authority ("FEA"). Said license was denied to Algonquin SNG for the year 1974 by the FEA, but on appeal to the Oil Import Appeals Board, Algonquin SNG received fee-free licenses for 485,000 barrels expiring April 30, 1975. Hence, Algonquin SNG must pay fees on the remainder of its imports.

4. The recent proclamation of January 23, 1975 of President Ford would increase a so-called "first tier" of license fees from 42¢ to 63¢ effective February 1, 1975. It also creates a second tier of license fees of $1.00 per barrel of imported oil in February, $2.00 per barrel in March and $3.00 per barrel in April and thereafter. Said increase may be subject to a rebate in February of an uncertain amount up to $1.00 per barrel, of a rebate in March of an uncertain amount up to $1.40 per barrel and to a rebate in April of an uncertain amount up to $1.80 per barrel. Assuming no rebate, the total fees that would be paid by Algonquin SNG for the balance of the winter period is estimated by me to equal nearly $950,000.

5. The aforesaid amount, if paid, must be absorbed by the Algonquin system because Algonquin Gas has no way of passing on said costs to its customers. The rates of Algonquin Gas are regulated by the Federal Power Commission and these rates do not include an escalation clause passing on the costs of feedstock. The only way for Algonquin Gas to reimburse itself for extra expenses is to file a rate case and, as a practical matter, said rate change cannot be made effective in less than six months.

6. The absorption of said extra costs by the Algonquin system would have a substantial adverse financial effect upon the Company. At such time as Algonquin Gas is able to pass said license fees onto its customers, said extra costs will result in a substantially higher gas bill for consumers in New England, with adverse effect on industry and economic and personal hardship on residential customers.

IN WITNESS WHEREOF, I have executed the within affidavit this 28th day of January, 1975.

/s/ William D. Jaques
WILLIAM D. JAQUES

Subscribed and sworn to before me
this 28th day of January, 1975.

/s/ [Illegible]
Notary Public

My Commission Expires December 4, 1976

AFFIDAVIT OF GUY W. NICHOLS

I, Guy W. Nichols, of Needham, Massachusetts, being duly sworn, depose and say as follows:

1. I am President of New England Power Company (NEPCO), a Massachusetts corporation and a subsidiary of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935.

2. NEPCO is the generation and transmission subsidiary of New England Electric System and, as such, is the wholesale supplier of substantially all the electric energy requirements of its affiliates, Massachusetts Electric Company, The Narragansett Electric Company, and Granite State Electric Company. These three affiliates of NEPCO provide electric service to approximately 1,000,000 customers in Massachusetts, New Hampshire, and Rhode Island.

3. NEPCO owns a four unit tidewater generating station at Brayton Point, Somerset, Massachusetts (approximately 1600 megawatts) and a four unit tidewater generating station at Salem Harbor, Massachusetts (approximately 770 megawatts).

4. Under NEPCO's current arrangement for fuel supply, its fuel contracts and purchase orders are assigned to a non-affiliated intermediary which purchases and holds the fuel in inventory, and sells the fuel to NEPCO at the time of burn at prices reflecting the cost of the fuel and the services of the intermediary. Therefore, any increase in the price of fuel to this intermediary, including import license fees, are paid by NEPCO in the cost of the fuel purchased from the intermediary.

5. Of the four units at Brayton Point, three units (or approximately 1150 megawatts) are capable of burning either coal or oil. NEPCO has requested and received a suspension of air quality regulations to burn coal in these three units until June 30, 1975. NEPCO estimates that it could burn as much as 11,000,000 barrels of imported residual fuel oil at this generating station in 1975.

6. Of the four units at Salem Harbor, three units (or

approximately 300 megawatts) are capable of burning either coal or oil. NEPCO has requested, but has not yet received, suspension of air quality regulations to burn coal in these three units. NEPCO estimates that it could burn as much as 6,600,000 barrels of imported residual fuel oil at this generating station in 1975.

7. The current cost of imported oil as delivered to the aforesaid plants is in excess of $12.00 per barrel, having gone up nearly three-fold since the 1973 oil embargo, and imposition of an additional $3.00 "second tier" license fee as referred to in paragraph 9 below will increase fuel costs per barrel by about 21.9%.

8. The increased cost of fuel occasioned by license fees is passed on to NEPCO's customers under a fuel adjustment clause in NEPCO's rates, and, in turn, The Narragansett Electric Company, Granite State Electric Company, and Massachusetts Electric Company pass on any such increases to their customers by means of fuel adjustment clauses.

9. The recent proclamation of January 23, 1975 of President Ford would increase by 21¢ per barrel present license fees (a so-called "first tier") to 63¢ per barrel and in addition would create a so-called "second tier" increase of license fees of $1.00 per barrel of imported oil in February, $2.00 per barrel in March and $3.00 per barrel in April, and thereafter. The effect of the rise in the first tier of license fees to 63¢ is uncertain as it depends upon fee-free quotas of plaintiffs' suppliers, quotas which are currently at 90% of a prior base period. The increase of the second tier license fees is estimated to amount in 1975 to $46,276,000 for NEPCO. Said increase may be subject to a rebate in February of an uncertain amount up to $1.00 per barrel, of a rebate in March of an uncertain amount up to $1.40 per barrel, and to a rebate in April and perhaps subsequent months of an uncertain amount up to $1.80 per barrel.

10. NEPCO will also pay increases in costs of purchased power generated by oil-fired plants of other companies as a result of increase in both tiers of license fees.

11. In addition, under proposed changes in FEA reg-

ulations occasioned by President Ford's recent proclamation, NEPCO will lose the benefit of the so-called entitlement program, which affiant is informed amounted to 47¢ per barrel imported in November, 1974, the latest month in which said amount has been computed by the federal government. Said amount is payable as of January.

12. In addition, fee-free exemptions under the so-called first tier of license fees, now being raised to 63¢ per barrel, will be phased out to zero by 1980, so that the full 63¢ per barrel will impact upon NEPCO by that date.

13. The impact of the increase in fee on NEPCO will be to substantially increase the carrying charges of fuel inventory. Such an increase in carrying charges would not be passed on to NEPCO's customers through its fuel adjustment clause. While NEPCO would attempt to recover the increase in carrying charges through rate proceedings, any such procedure would involve a lag in the recovery thereof.

14. Any resulting increase in the cost of electricity to NEPCO's customers would cause severe economic hardship to the ultimate consumer of electricity.

IN WITNESS WHEREOF, I have executed the within affidavit this 31st day of January, 1975.

/s/ Guy W. Nichols
GUY W. NICHOLS

Subscribed and Sworn to before me this 31st day of January, 1975.

/s/ [Illegible]
Notary Public

My commission expires: [Illegible]

PROCLAMATION NO. 3279

ADJUSTING IMPORTS OF PETROLEUM AND PETROLEUM PRODUCTS INTO THE UNITED STATES

By the President of the United States of America

A PROCLAMATION

WHEREAS, pursuant to section 2 of the act of July 1, 1954, as amended (72 Stat. 678, 19 U.S.C. 1352a), the Director of the Office of Civil and Defense Mobilization has made an appropriate investigation to determine the effects on the national security of imports of crude oil and crude oil derivatives and products and, having considered the matters required by him to be considered by the said act of July 1, 1954, as amended, has advised me of his opinion "that crude oil and the principal crude oil derivatives and products are being imported in such quantities and under such circumstances as to threaten to impair the national security"; and

WHEREAS, having considered the matters required by me to be considered by the said act of July 1, 1954, as amended, I agree with the said advice; and

WHEREAS I find and declare that adjustments must be made in the imports of crude oil, unfinished oils, and finished proucts, so that such imports will not so threaten to impair the national security; and

WHEREAS I find and declare that within the continental United States there are two areas, one, east of the Rocky Mountains (Districts I-IV), in which there is substantial oil production capacity in excess of actual production, and the other, west of the Rocky Mountains (District V), in which production is declining and in which, due to the absence of any significant inter-area flow of oil, limited imports are necessary to meet demand, and that accordingly, imports into such areas must be treated differently to avoid discouragement of and de-

crease in domestic oil production, exploration and development to the detriment of the national security; and

WHEREAS I find and declare that the Commonwealth of Puerto Rico largely depends upon imported crude oil, unfinished oils, and finished products and that any system for the adjustment of imports of such commodities should permit imports into Puerto Rico adequate for the purposes of local consumption, export to foreign areas, and limited shipment of finished products to the continental United States:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, acting under and by virtue of the authority vested in me by section 2 of the act of July 1, 1954, as amended, do hereby proclaim as follows:

Section 1. (a) In Districts I-IV, District V, and in Puerto Rico, on and after March 11, 1959, no crude oil or unfinished oils may be entered for consumption or withdrawn from warehouse for consumption, and on and after April 1, 1959, no finished products may be entered for consumption or withdrawn from warehouse for consumption, except (1) by or for the account of a person to whom a license has been issued by the Secretary of the Interior pursuant to an allocation made to such person by the Secretary in accordance with regulations issued by the Secretary, and such entries and withdrawals may be made only in accordance with the terms of such license, or (2) as authorized by the Secretary pursuant to paragraph (b) of this section, or (3) as to finished products, by or for the account of a department, establishment, or agency of the United States, which shall not be required to have such a license but which shall be subject to the provisions of paragraph (c) of this section, or (4) crude oil, unfinished oils, or finished products which are transported into the United States by pipeline, rail, or other means of overland transportation from the country where they were produced, which country, in the case of unfinished oils or finished products, is also the country of production of the crude oil from which they were processed or manufactured.

(b) The Secretary of the Interior may, in his discretion, authorize entries without a license of small quantities of crude oil, unfinished oils, or finished products, including samples for testing or analysis, baggage entries, and informal entries.

(c) In Districts I-IV, District V, and in Puerto Rico, on and after April 1, 1959, no department, establishment, or agency of the United States shall import finished products in excess of the respective allocations made to them by the Secretary of the Interior. Such allocations shall be within the maximum levels of imports established in section 2 of this proclamation.

Sec. 2. (a) (1) In Districts I-IV, for a particular allocation period the maximum level of imports, subject to allocation, of crude oil, unfinished oils, and finished products other than residual fuel oil to be used as fuel shall be an amount equal to the difference between 12.2 percent of the quantity of crude oil and natural gas liquids which the Secretary of the Interior estimates will be produced in these districts during that allocation period and the quantity of imports of crude oil, unfinished oils, and finished products excepted by clause (4) of paragraph (a) of section 1 which the Secretary of the Interior estimates will be imported into these districts during that allocation period. As used in this subparagraph, the term "natural gas liquids" means natural gas products and other hydrocarbons such as isopentane, propane, butane, propylene, and butylene, or mixtures thereof, recovered from natural gas by means other than refining. Within such maximum level, the imports of finished products other than residual fuel oil to be used as fuel shall not exceed the level of imports of such products into these districts during the calendar year 1957 and imports of unfinished oils shall not exceed 10 percent of the permissible imports of crude oil and unfinished oils.

(2) In District I the imports of residual fuel oil to be used as fuel shall not exceed the level of imports of that product into that district during the calendar year 1957. In Districts II-IV the imports of residual fuel oil to be used as fuel shall not exceed the level of imports

of that product into those districts during the calendar year 1957.

(b) In District V the maximum level of imports of crude oil and finished products shall be an amount which, together with domestic production and supply and imports excepted by clause (4) of paragraph (a) of section 1 of this proclamation, will approximate total demand in that district as estimated by the Bureau of Mines for periods fixed by the Secretary and, for the purposes of this limitation, imports of unfinished oils shall be considered to be the equivalent of imports of crude oil on the basis of such ratios as the Secretary may establish. Within this maximum level, imports of finished products shall not exceed the level of imports of such products into this district during the calendar year 1957. Imports of unfinished oils as such (without respect to the requirement of equivalence) shall not exceed such per centum of the permissible imports of crude oil as the Secretary may from time to time determine.

(c) The maximum level of imports of crude oil, unfinished oils, and finished products into Puerto Rico shall be approximately the level of imports into Puerto Rico during all or part of the calendar year 1958, as determined by the Secretary of the Interior to be consonant with the purposes of this proclamation, or such lower or higher levels as the Secretary may subsequently determine are required to meet increases or decreases in local demand in Puerto Rico or demand for export to foreign areas.

(d) The Secretary of the Interior shall keep under review the imports into Districts I-IV and into District V of residual fuel oil to be used as fuel and the Secretary may make, notwithstanding the levels prescribed in paragraphs (a) and (b) of this section and on a monthly basis if required, such adjustments in the maximum levels of such imports as he may determine to be consonant with the objectives of this proclamation.

(e) The levels established, and the total demand referred to, in this section do not include free withdrawals by persons pursuant to section 309 of the Tariff Act of 1930, as amended (19 U.S.C.A. § 1309), or petroleum

supplies for vessels or aircraft operated by the United States between points referred to in said section 309 (as to vessels or aircraft, respectively) or between any point in the United States or its possessions and any point in a foreign country.

Sec. 3. (a) The Secretary of the Interior is hereby authorized to issue regulations for the purpose of implementing this proclamation. Such regulations shall be consistent with the levels established in this proclamation for imports of crude oil, unfinished oils, and finished products into Districts I-IV, into District V, and into Puerto Rico, and shall provide for a system of allocation of the authorized imports of such crude oil, unfinished oils and finished products and for the issuance of licenses pursuant to such system, with such restrictions upon the transfer of allocations and licenses as may be deemed appropriate to further the purposes of this proclamation.

(b) (1) With respect to the allocations of imports of crude oil and unfinished oils into Districts I-IV and into District V, such regulations shall provide, to the extent possible, for a fair and equitable distribution among persons having refinery capacity in these districts in relation to refinery inputs on the basis of a graduated scale (excluding inputs of crude oil or unfinished oils imported pursuant to clause (4) of paragraph (a) of section 1) during an appropriate period or periods selected by the Secretary. Provision shall be made in such regulations for the gradual reduction of allocations made on the basis of the last allocations of imports of crude oil under the Voluntary Oil Import Program, except that provisions shall be made for a more rapid reduction of those allocations based on allocations under the Voluntary Oil Import Program which reflected imports of crude oil in the category now covered by clause (4) of paragraph (a) of section 1.

(2) Such regulations shall provide for the allocation of imports of crude oil and unfinished oils into Puerto Rico among persons having refinery capacity in Puerto Rico in relation to refinery inputs during all or a part of the calendar year 1958 as the Secretary may determine.

(3) Such regulations shall require that imported crude oil and unfinished oils be processed in the licensee's refinery except that exchanges for domestic crude or unfinished oils may be made if otherwise lawful, if effected on a current basis and reported in advance to the Secretary, and if the domestic crude or unfinished oils are processed in the licensee's refinery.

(4) With respect to the allocation of imports of finished products, other than residual fuel oil to be used as fuel, into Districts I-IV, District V, and Puerto Rico, such regulations shall, to the extent possible, provide (i) for a fair and equitable distribution of imports of such finished products among persons who have been importers of such finished products into the respective districts or Puerto Rico during the respective base periods specified in section 2 of this proclamation, and (ii) for the granting and adjustment of allocations of imports of such finished products in accordance with procedures established pursuant to section 4 of this proclamation.

(5) With respect to the allocation of imports of residual fuel oil to be used as fuel into Districts II-IV, District V, and Puerto Rico, such regulations shall, to the extent possible, provide for a fair and equitable distribution of imports of residual fuel oil to be used as fuel among persons who have been importers of that product into the respective districts or Puerto Rico during the respective base periods specified in section 2 of this proclamation. With respect to the allocation of imports into District I of residual fuel oil to be used as fuel, such regulations shall, to the extent possible, provide for a fair and equitable distribution of imports of residual fuel oil to be used as fuel among persons who have been importers of that product into such district during the calendar year 1957 and among persons who are in the business in District I of selling residual fuel oil to be used as fuel and who have had inputs of that product to deep-water terminals located in District I, in relation to such terminal inputs on the basis of a graduated scale. With respect to the allocation of imports of residual fuel oil to be used as fuel into District I, Districts II-IV, District V, and Puerto Rico,

such regulations shall also provide, to the extent possible, for the granting and adjustment of allocations of imports of residual fuel oil to be used as fuel in accordance with procedures established pursuant to section 4 of this proclamation.

(c) Such regulations may provide for the revocation or suspension by the Secretary of any allocation or license on grounds relating to the national security, or the violation of the terms of this proclamation, or of any regulation or license issued pursuant to this proclamation.

Sec. 4. (a) The Secretary of the Interior is authorized to provide for the establishment and operation of an Appeals Board to consider petitions by persons affected by the regulations issued pursuant to Section 3 of this proclamation. The Appeals Board shall be comprised of a representative each from the Departments of the Interior, Defense, and Commerce to be designated respectively by the heads of such Departments.

(b) The Appeals Board may be empowered, within the limits of the maximum levels of imports established in section 2 of this proclamation (1) to modify, on the grounds of exceptional hardship or error, any allocation made to any person under such regulations; (2) to grant allocations of crude oil and unfinished oils in special circumstances to persons with importing histories who do not qualify for allocations under such regulations; (3) to grant allocations of finished products on the ground of exceptional hardship to persons who do not qualify for allocations under such regulations; and (4) to review the revocation or suspension of any allocation or license. The Secretary may provide that the Board may take such action on petitions as it deems appropriate and that the decisions by the Appeals Board shall be final.

Sec. 5. Persons who apply for allocations of crude oil, unfinished oils, or finished products and persons to whom such allocations have been made shall furnish to the Secretary of the Interior such information and shall make such reports as he may require, by regulation or otherwise, in the discharge of his responsibilities under this proclamation.

Sec. 6. (a) The Director of the Office of Emergency Planning shall maintain a constant surveillance of imports of petroleum and its primary derivatives in respect of the national security and, after consultation with the Secretaries of State, Defense, Treasury, the Interior, Commerce, and Labor, he shall inform the President of any circumstances which, in the Director's opinion might indicate the need for further Presidential action under Section 2 of the act of July 1, 1954, as amended [this section]. In the event prices of crude oil or its products or derivatives should be increased after the effective date of this proclamation, such surveillance shall include a determination as to whether such increase or increases are necessary to accomplish the national security objectives of the act of July 1, 1954, as amended, and of this proclamation.

(b) The Special Committee to Investigate Crude Oil Imports is hereby discharged of its responsibilities.

Sec. 7. The Secretary of the Interior may delegate, and provide for successive redelegation of, the authority conferred upon him by this proclamation. All departments and agencies of the Executive branch of the Government shall cooperate with and assist the Secretary of the Interior in carrying out the purposes of this proclamation.

Sec. 8. Executive Order 10761 of March 27, 1958, entitled "Government Purchases of Crude Petroleum and Petroleum Products" (23 F.R. 2067) is hereby revoked as of April 1, 1959.

Sec. 9. As used in this proclamation:

(a) "Person" includes an individual, a corporation, firm, or other business organization or legal entity, and an agency of a state, territorial, or local government, but does not include a department, establishment, or agency of the United States;

(b) "District I" means the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Delaware, West Virginia, Virginia, North Carolina,

South Carolina, Georgia, and Florida, and the District of Columbia.

(c) "Districts II-IV" means all of the States of the United States except those States within District I and District V.

(d) "Districts I-IV" means the District of Columbia and all of the States of the United States except those States within District V;

(e) "District V" means the States of Arizona, Nevada, California, Oregon, Washington, Alaska, and Hawaii;

(f) "Crude oil" means crude petroleum as it is produced at the well-head and liquids (under atmospheric conditions) that have been recovered from mixtures of hydrocarbons which existed in a vaporous phase in a reservoir and that are not natural gas products;

(g) "Finished Products" means any one or more of the following petroleum oils, or a mixture or combination of such oils, which are to be used without further processing except blending by mechanical means:

(1) liquified gases—hydrocarbon gases recovered from natural gas or produced from petroleum refining and kept under pressure to maintain a liquid state at ambient temperatures;

(2) gasoline—a refined petroleum distillate which, by its composition, is suitable for use as a carburant in internal combustion engines;

(3) jet fuel—a refined petroleum distillate used to fuel jet propulsion engines;

(4) naphtha—a refined petroleum distillate falling within a distillation range overlapping the higher gasoline and the lower kerosenes;

(5) fuel oil—a liquid or liquefiable petroleum product burned for lighting or for the generation of heat or power and derived directly or indirectly from crude oil, such as kerosene, range oil, distillate fuels oils, gas oil, diesel fuel, topped crude oil, residues;

(6) lubricating oil—a refined petroleum distillate or specially treated petroleum residue used to lessen friction between surfaces;

(7) residual fuel oil—a topped crude oil or viscous residuum which, as obtained in refining or after blending with other fuel oil, meets or is the equivalent of Military Specification Mil-F-859 for Navy Special Fuel Oil and any other more viscous fuel oil, such as No. 5 or Bunker C;

(8) asphalt—a solid or semi-solid cementitious material which gradually liquifies when heated, in which the predominating constituents are bitumins, and which is obtained in refining crude oil.

(9) "natural gas products" means liquids (under atmospheric conditions), including natural gasoline, which are recovered by a process of absorption, adsorption, compression, refrigeration, cycling, or a combination of such processes, from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir and which, when recovered and without processing in a refinery, otherwise fall within any of the definitions of products contained in clauses (2) through (5), inclusive, of this paragraph (g).

(h) "Unfinished Oils" means one or more of the petroleum oils listed in paragraph (e) of this section, or a mixture or combination of such oils, which are to be further processed other than by blending by mechanical means.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 10th day of March in the year of our Lord nineteen hundred and Fifty-nine, and of the Independence of the United States of America the one hundred and eighty-third.

[SEAL]

DWIGHT D. EISENHOWER

PROCLAMATION 4210

MODIFYING PROCLAMATION 3279, RELATING TO IMPORTS OF PETROLEUM AND PETROLEUM PRODUCTS, PROVIDING FOR THE LONG-TERM CONTROL OF IMPORTS OF PETROLEUM AND PETROLEUM PRODUCTS THROUGH A SYSTEM OF LICENSE FEES AND PROVIDING FOR GRADUAL REDUCTION OF LEVELS OF IMPORTS OF CRUDE OIL, UNFINISHED OILS AND FINISHED PRODUCTS

By the President of the United States of America

A PROCLAMATION

The Chairman of the Oil Policy Committee maintains a constant surveillance of imports of petroleum and its primary derivatives in respect to the national security.

He informs me that, in the course of his surveillance, he has reviewed the status of imports under Proclamation 3279,[1] as amended, of petroleum and its primary derivatives in their relation to the national security and that further Presidential action under section 232 of the Trade Expansion Act of 1962, as amended, is required.

He recommends, after consultation with the Oil Policy Committee, that the method of adjusting imports of petroleum and petroleum products be modified by immediately suspending tariffs on imports of petroleum and petroleum products and by shifting to a system whereby fees for licenses covering such imports shall be charged and whereby such fees may be adjusted from time to time, as required in order to discourage the importation into the United States of petroleum and petroleum products in such quantities or under such circumstances as to threaten to impair the national security; to create condi-

[1] 24 FR 1781; 3 CFR, 1959-1963 Comp., p. 11.

tions favorable, in the long range, to domestic production needed for projected national security requirements; to increase the capacity of domestic refineries and petrochemical plants to meet such requirements; and to encourage investment, exploration, and development necessary to assure such growth.

The Chairman informs me further, that the levels of imports heretofore fixed in calendar year 1973, with respect to Districts I-IV, District V, and Puerto Rico, reflect application of the established policy that for each such area the maximum level of imports shall be the difference between estimated supply and estimated demand, and that he finds that such levels of imports should be continued to be permitted without payment of the fees otherwise provided for in this proclamation.

I agree with the recommendations of the Chairman, and I deem it necessary and consistent with the national security objectives of the Trade Expansion Act of 1962, as amended, that provision be made for a gradual transition from the existing quota method of adjusting imports of petroleum and petroleum products to a long-term program for adjustment of imports of petroleum and petroleum products through the suspension of existing tariffs and the institution of a system of fees applicable to imports of crude oil, unfinished oils, and finished products, which fees may be adjusted from time to time.

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and laws of the United States, including section 232 of the Trade Expansion Act of 1962, do hereby proclaim that, effective as of this date, that portion of Proclamation 3279, as amended, beginning with section 1 thereof, is hereby amended to read as follows:

"SEC. 1(a) In Districts I-IV, in District V, and in Puerto Rico, no crude oil, unfinished oils, or finished products may be entered for consumption or withdrawn

from warehouse for consumption, except (1) by or for the account of a person to whom a license has been issued by the Secretary of the Interior pursuant to an allocation made to such person by the Secretary in accordance with regulations issued by the Secretary, and such entries or withdrawals may be made only in accordance with the terms of such license, or (2) as authorized by the Secretary pursuant to paragraph (b) of this section, or (3) as to finished products, by or for the account of a department, establishment, or agency of the United States, which shall not be required to have such a license but which shall be subject to the provisions of paragraph (c) of this section, or (4) as provided in paragraph (c) of this section, or (5) as otherwise provided in this proclamation.

(b) The Secretary of the Interior may, in his discretion, authorize entries, without allocation or license, of small quantities of crude oil, unfinished oils, or finished products.

(c) In Districts I-IV, District V, and in Puerto Rico, no department, establishment, or agency of the United States shall without prior payment of the fees provided for in this proclamation, import finished products in excess of the respective allocations made to them by the Secretary of the Interior. Such allocations shall, except as otherwise provided in this proclamation, be within the maximum levels of imports established in section 2 of this proclamation.

(d) The Secretary may, by regulation, provide that no allocation or license shall be required in connection with the transportation to the United States by pipeline through a foreign country of crude oil, unfinished oils, or finished products produced in the customs territory of the United States or, in the event of commingling with foreign oils of like kind and qualities incidental to such transportation, of quantities equivalent to the quantities produced in and shipped from such customs territory."

"SEC. 2(a) Except as otherwise provided in this proclamation, the maximum level of imports, from sources

other than Canada and Mexico which may be made without prior payment of the fees provided in this proclamation, of crude oil, unfinished oils, and finished products (other than residual fuel oil to be used as fuel) shall be:

(1) for Districts I-IV, 1,992,000 average barrels per day per calendar year: *Provided*, That, in addition to the foregoing, there may be imported into District I an average of 50,000 barrels per day of No. 2 fuel oil, manufactured in the Western Hemisphere from crude oil produced in the Western Hemisphere under allocations made by the Secretary, pursuant to regulations of the Secretary, to deepwater terminal operators currently receiving allocations and who do not have crude oil import allocations into Districts I-IV; *Provided Further*, That, whenever the Chairman of the Oil Policy Committee finds that, because of supply, price, or other considerations, the requirement that No. 2 fuel oil be manufactured in the Western Hemisphere from crude oil produced in the Western Hemisphere is unduly restricting the availability of such oil for importation into District I and is not required for the national security, he shall so advise the Secretary who shall then suspend such requirement by appropriate regulation. No such suspension shall be renewed except upon a new finding by the Chairman as required by the preceding sentence; *Provided Further*, That, the Secretary may, by regulation, provide that a holder of an allocation for the importation of No. 2 fuel oil may import crude oil produced in the Western Hemisphere in lieu of No. 2 fuel oil, barrel for barrel, and exchange such crude oil for No. 2 fuel oil.

(2) for District V, 670,000 average barrels per day per calendar year.

(3) for Puerto Rico 227,221 average barrels per day per year commencing April 1, 1973; *Provided*, That no person who manufactures in Puerto Rico No. 2 fuel oil from crude oil produced in the Western Hemisphere shall incur a reduction of an allocation or be deemed to have violated a condition of an allocation by reason of a shipment of such oil to a person who holds an allocation of imports of No. 2 fuel oil into District I and who does not have a crude oil import allocation into District I; *Provided Further*, That, this limitation shall not apply to long-term allocations of imports into Puerto Rico.

(4) for District I, 2,900,000 average barrels per day per year, commencing April 1, 1973, of residual fuel oil to be used as fuel.

(5) for Districts II-IV, 42,000 average barrels per day per calendar year of residual fuel oil to be used as fuel.

(6) for District V, 75,600 average barrels per day per calendar year of residual fuel oil to be used as fuel.

(b) Imports of asphalt, ethane, propane, and butanes shall not be subject to the levels established in this proclamation nor shall any allocation or license be required for their importation.

(c) Crude oil may be imported into District I to be topped for use as burner fuel under such conditions as the Secretary may, by regulation, provide. The quantities of crude oil, unfinished oils, and finished products that may be imported into the United States under the provisions of this proclamation shall not be reduced by reason of imports of crude oil used as fuel under this paragraph.

(d) (1) Except as otherwise provided in this proclamation, the maximum levels of imports from Canada of crude oil and unfinished oils to which license fees are not applicable shall be:

(i) for Districts I-IV, 960,000 average barrels per day per calendar year; *Provided*, That, the Secretary may, within the limits established by subparagraph (1) of paragraph (a) of this section, increase the quantity of crude oil, unfinished oils, and finished products which may be imported from Canada so long as such increase is consonant with the purposes of this proclamation.

(ii) for District V, 280,000 average barrels per day per calendar year; *Provided*, That, the Secretary may, within the limits established by subparagraph (1) of

paragraph (a) of this section, increase the quantity of crude oil, unfinished oils, and finished products which may be imported from Canada so long as such increase is consonant with the purposes of this proclamation.

(2) Entries for consumption of imports from Canada by pipeline may be made until midnight January 15 of the calendar year following the calendar year in which any license authorizing such imports from Canada was issued.

(e) Except as otherwise provided in this proclamation, the maximum level of imports from Mexico of crude oil produced in Mexico and unfinished oils and finished products produced in Mexico wholly from Mexican crude oil shall be 32,500 average barrels per day per calendar year.

(f) The levels established, and the total demand referred to, in this section do not include free withdrawals by persons pursuant to section 309 of the Tariff Act of 1930, as amended (19 U.S.C. 1309), or petroleum supplies for vessels or aircraft operated by the United States between points referred to in said section 309 (as to vessels or aircraft, respectively) or between any point in the United States or its possessions and any point in a foreign country."

"SEC. 3(a) Effective May 1, 1973, the Secretary shall, by regulation, establish a system of fees for licenses issued under allocations of imports of crude oil, unfinished oils, and finished products, over the above levels of imports established by section 2 of this proclamation. Such regulations shall require, among other appropriate provisions, that such fees shall be:

FEE SCHEDULE

[Cents per barrel]

	May 1, 1973	Nov. 1, 1973	May 1, 1974	Nov. 1, 1974	May 1, 1975	Nov. 1, 1975
Crude	10½	13	15½	18	21	21
Motor gasoline	52	54½	57	59½	63	63
All other finished products and unfinished oils (except ethane, propane and butane)	15	20	30	42	52	63

Provided, That, license fees paid for imports of crude oil or unfinished oils will be refunded to the extent that such crude oils or unfinished oils have been incorporated into petrochemical or finished products subsequently exported or that asphalt as defined in this proclamation was produced from the imported feedstocks.

(b) Except for allocation and licenses to which the license fee is not applicable, applications for allocations of imports of crude oil, unfinished oils, or finished products shall be accompanied by the applicant's certified check or a cashier's check payable to the order of the Treasurer of the United States in the appropriate amount chargeable pursuant to this section. Applications not accompanied by a certified or cashier's check in the amount required shall not be considered.

(c)(1) All monies received by the Secretary under the terms of paragraph (b) of this section shall be held by the Secretary of the Interior in a suspense account and may be drawn upon by the Secretary for the payment of any refunds of refundable license fees and for payments to Puerto Rico of sums collected by way of license fees for imports into Puerto Rico. Balances remaining in such suspense account not required for payment hereinabove provided shall be deposited at the end of each fiscal year in the Treasury of the United States and credited to miscellaneous receipts.

(2) Refunds pursuant to subparagraph (1) of paragraph (c) of this section shall be made without interest."

"SEC. 4(a) The Secretary of the Interior is hereby authorized to issue regulations for the purpose of implementing this proclamation.

(b)(1) With respect to the allocation of imports of crude oil and unfinished oils into Districts I-IV and into District V, such regulations shall provide for a fair and equitable distribution of allocations of imports for which license fees are not applicable among eligible persons having refinery capacity in relation to refinery inputs or in relation to storage capacities of such allocation holders. The Secretary may, by regulation, also provide for the making of allocations of imports for which license fees are not applicable, of crude oil and unfinished oils into Districts I-IV and into District V to persons having petrochemical plants in these districts in relation to the outputs of such plants or in relation to inputs to such plants. Provision may be made in the regulations for the making of such allocations on the basis of graduated scales. Notwithstanding the levels prescribed in section 2 of this proclamation, the Secretary may also by regulation make such provisions as he deems consonant with the objectives of this proclamation for the making of allocations of imports of crude oil and unfinished oils to which the license fee is not applicable into Districts I-IV and into District V to persons who manufacture from crude oil and unfinished oils and who export finished products and petrochemicals, subject to such designations as the Secretary may make. Notwithstanding the levels established in section 2 of this proclamation the Secretary may make allocations to which license fees shall not be applicable to new, expanded, or reactivated refinery capacity and petrochemical plants for a period of five years from the date such facility comes on stream. Such allocations shall not exceed 75 percent of estimated refinery inputs or the percentage of petrochemical plant inputs applicable.

(2) Such regulations shall provide for the allocations of imports with respect to which license fees are not applicable of crude oil and unfinished oils into Puerto Rico among persons having refinery capacity in Puerto Rico in the calendar year 1964 on the basis of the allocation of crude and unfinished oils received by such persons for the allocation period commencing April 1, 1973; *Provided*, That, in respect of imports for which license fees are applicable, license fees paid for imports of crude oil and unfinished oils into Puerto Rico will be refunded to the extent that such crude oil or unfinished oils have been incorporated into finished products consumed in Puerto Rico or petrochemicals or finished products exported therefrom.

(3) Except for crude oil or unfinished oils imported under license or licenses for which a fee has been charged, or pursuant to specific relief granted pursuant to section 5, such regulations shall require that imported crude oil and unfinished oils be processed in the licensee's refinery or petrochemical plant, except that exchanges for domestic crude or unfinished oils may be made, if otherwise lawful, if effected on a current basis and reported in advance to the Secretary, and if the domestic crude or unfinished oils are processed in the licensee's refinery or petrochemical plant.

(4) With respect to the allocation of imports of finished products (other than residual fuel oil to be used as fuel) in respect of which license fees are not applicable into Puerto Rico, such regulations shall provide, to the extent possible for a fair and equitable distribution of imports of such finished products among persons who were importers of such finished products into Puerto Rico during all or part of the calendar year 1958, or such higher level as the Secretary may have determined to be required to meet demand in Puerto Rico for finished products that would not otherwise have been met, during the calendar year 1973.

(5) With respect to the allocation of imports to which license fees are not applicable of residual fuel oil to be

used as fuel in Puerto Rico, such regulations shall, to the extent possible, provide for a fair and equitable distribution of imports of residual fuel oil to be used as fuel among persons who were importers of that product into Puerto Rico during all or part of the calendar year 1958. In addition, the Secretary by regulation may, to the extent possible, provide for a fair and equitable distribution of imports of residual fuel oil to be used as fuel, the maximum sulphur content of which is acceptable to the Secretary (i) among persons who are in the business in the respective districts or Puerto Rico of selling residual fuel oil to be used as fuel and who had inputs of that product to deepwater terminals located in the respective districts or Puerto Rico and (ii) among persons who are in the business in the respective districts or Puerto Rico of selling residual fuel oil to be used as fuel and who have throughput agreements (warehouse agreements) with deepwater terminal operators. With respect to the allocation of imports into District I of residual fuel oil to be used as fuel, such regulations shall, to the extent possible, provide for a fair and equitable distribution of imports of residual fuel oil to be used as fuel (i) among persons who are in the business in District I of selling residual fuel oil to be used as fuel and who have had inputs of that product to deepwater terminals located in District I, and (ii) among persons who are in the business in District I of selling residual fuel oil to be used as fuel and have throughput agreements (warehouse agreements) with deepwater terminal operators. With respect to the allocation of imports of residual fuel oil to be used as fuel into District I, Districts II-IV, District V, and Puerto Rico, such regulations shall also provide, to the extent possible, for the granting of allocations of imports of residual fuel oil to be used as fuel in accordance with procedures established pursuant to section 5 of this proclamation.

(c) Such regulations may provide for the revocation or suspension by the Secretary of any allocation or

license on grounds relating to the national security, or the violation of the terms of this proclamation, or of any regulation, allocation, or license issued pursuant to this proclamation.

(d) For the balance of the calendar year 1973, notwithstanding the levels established in section 2 of this proclamation and the provisions of paragraph (b) of this section, the Secretary may provide by regulation for additional allocations of imports in respect of which license fees are not applicable of crude oil and unfinished oils to persons in District I-IV, and District V who manufacture in the United States residual fuel oil to be used as fuel, the maximum sulphur content of which is acceptable to the Secretary, in consultation with the Secretary of Health, Education, and Welfare. These allocations to each of such persons shall not exceed the amount of such residual fuel oil manufactured by that person."

"SEC. 5(a) The Secretary of the Interior is authorized to provide for the establishment and operation of an Appeals Board to consider petitions by persons affected by the regulations issued pursuant to this proclamation. The Appeals Board shall be comprised of a representative each from the Departments of the Interior, Justice, and Commerce to be designated respectively by the heads of such Departments.

(b) The Appeals Board may be empowered, subject to the general direction of the Chairman of the Oil Policy Committee, (1) within the limits of the maximum levels of imports established in this proclamation, to modify on the grounds of error any allocation made to any person under such regulations; (2) without regard to the limits of the maximum levels of imports established in this proclamation, (i) to modify, on the grounds of exceptional hardship, any allocation with respect to which license fees are not applicable made to any person under such regulations; (ii) to grant allocations of imports to which license fees will not be

applicable of crude oil and unfinished oils in special circumstances to persons with importing histories who do not qualify for allocations under such regulations; and (iii) to grant allocations of imports, to which license fees shall not be applicable, of finished products on the grounds of exceptional hardship; and to assure that adequate supplies of crude oil, unfinished oils, and finished products are made available to independent refiners or established marketers who are experiencing exceptional hardship or in emergencies requiring, in its judgment, the grant of allocations to them, and (3) to review the revocation or suspension of any allocation or license. The Secretary may provide that the Board may take such action on petitions as it deems appropriate and that the decisions by the Appeals Board shall be final.

(c) Effective April 30, 1980, the jurisdiction of the Oil Import Appeals Board shall expire."

"SEC. 6 Persons who apply for allocations of crude oil, unfinished oils, or finished products, persons to whom such allocations have been made, and persons who hold such allocations shall furnish to the Secretary of the Interior such information and shall make such reports as he may require, by regulations or otherwise, in the discharge of his responsibilities under this proclamation."

"SEC. 7 The Chairman of the Oil Policy Committee shall provide policy direction, coordination, and surveillance of the oil import control program, including approval of regulations issued pursuant to this proclamation. He shall perform those functions after receiving the advice of the Oil Policy Committee and in accordance with guidance from the Assistant to the President with responsibility in the area of economic affairs."

"SEC. 8 The Oil Policy Committee shall consist of the Deputy Secretary of the Treasury, as Chairman, and the Secretaries of State, Defense, Interior, and Commerce, the Attorney General, and the Chairman of the Council of Economic Advisers, as members. The President may, from time to time, designate other officials to serve as members of the Committee. The Chairman may create

subcommittees of the Committee to study and report to the Committee concerning specified subject matters."

"SEC. 9 The Oil Policy Committee shall consult with and advise the Chairman on oil import policy, including the operation of the control program under Proclamation 3279, as amended, and on recommendations for changes in the program by the issuance of new proclamations with respect to it, or otherwise."

"SEC. 10 The Chairman of the Oil Policy Committee shall from time to time, as in his judgment is required, review the status of imports of petroleum and its primary derivatives in respect to the national security, and, after consultation with the Oil Policy Committee, he shall inform the President of any circumstances which, in the Chairman's opinion, might indicate the need for further Presidential action under section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended. In the event prices of crude oil or its products or derivatives should be increased after the effective date of this proclamation, beyond the limits contemplated by the Cost of Living Council, such review may include a determination as to whether such increase or increases are necessary to accomplish the national security objectives of section 232 of the Trade Expansion Act of 1962, as amended, and this proclamation."

"SEC. 11 Annually, beginning May 1, 1974, the maximum levels of imports subject to allocation and license, to which license fees shall not be applicable, shall be reduced as follows:

For the year commencing May 1, 1974, the maximum levels of such imports shall be ninety percent (90%), in barrels per day, of the levels established during the calendar year 1973;

For the year commencing May 1, 1975, the maximum levels of such imports shall be eighty percent (80%), in barrels per day, of the levels established during the calendar year 1973;

For the year commencing May 1, 1976, the maximum levels of such imports shall be sixty-five percent (65%),

in barrels per day, of the levels established during the calendar year 1973;

For the year commencing May 1, 1977, the maximum levels of such imports shall be fifty percent (50%), in barrels per day, of the levels established during the calendar year 1973;

For the year commencing May 1, 1978, the maximum levels of such imports shall be thirty-five percent (35%), in barrels per day, of the levels established during the calendar year 1973;

For the year commencing May 1, 1979, the maximum levels of such imports shall be twenty percent (20%), in barrels per day, of the levels established during the calendar year 1973.

Effective April 30, 1980, the system of issuing allocations and licenses not subject to license fee shall be abolished;

Provided, That, with respect to any allocation period expiring prior to May 1, 1974, such allocation period shall be extended to April 30, 1974, and the Secretary shall issue appropriate regulations to issue additional oil import licenses to reflect such extension."

"SEC. 12(a) Commitments and obligations contained in long-term allocations heretofore made of imports of crude oil into Puerto Rico shall be unimpaired by this proclamation or regulations issued thereunder.

(b) Commitments and obligations contained in that certain allocation made to Hess Oil and Chemical Corporation of imports of finished products into Districts I-IV, dated December 12, 1967, effective January 1, 1968, shall be unimpaired by this proclamation or regulations issued thereunder."

"SEC. 13 The Secretary of the Interior may delegate, and provide for successive redelegation of, the authority conferred upon him by this proclamation. All departments and agencies of the Executive Branch of the Government shall cooperate with and assist the Secretary of the Interior in carrying out the purposes of this proclamation."

"SEC. 14 Executive Order 1.0761 of March 27, 1958, entitled "Government Purchases of Crude Petroleum and Petroleum Products" (23 FR 2067) is revoked."

"SEC. 15 As used in this proclamation:

(a) "Person" includes an individual, a corporation, firm, or other business organization or legal entity, and an agency of a state, territorial or local government, but does not include a department, establishment, or agency of the United States.

(b) "District I" means the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Delaware, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, and the District of Columbia.

(c) "Districts II-IV" means all of the states of the United States except those states within District I and District V.

(d) "Districts I-IV" means the District of Columbia and all of the states of the United States except those states within District V.

(e) "District V" means the states of Arizona, Nevada, California, Oregon, Washington, Alaska, and Hawaii.

(f) "Crude oil" means a mixture of hydrocarbons that existed in natural underground reservoirs and which is liquid at atmospheric pressure after passing through surface separating processes and does not include natural gas products. It includes the initial liquid hydrocarbons produced from tar sands, gilsonite, and oil shale.

(g) "Finished products" means any one or more of the following petroleum oils, or a mixture or combination of such oils, or any component or components of such oils which are to be used without further processing by any one or more of the processes described in subparagraphs (1) through (3) of paragraph (h) of this section, and which, as of January 1, 1973, under the Tariff Schedules of the United States, were not subject to a duty of more than one cent ($0.01) per pound of the hydrocarbons therein contained:

(1) The term "liquefied gases" means the following liquefied or liquefiable gases, namely, ethane, propane, butanes, ethylene, propylene, and butylenes which are derived by refining or other processing of natural gas, crude oil, or unfinished oils.

(2) "Gasoline" means a refined petroleum distillate, including naphtha, jet fuel or other petroleum oils (but not isoprene or cumene having a purity of 50 percent or more by weight, or benzene which meets the ASTM distillation standards for nitration grade) derived by refining or processing crude oil or unfinished oils, in whatever type of plant such refining or processing may occur, and having a boiling range at atmospheric pressure from 80° to 400° F.

(3) "Kerosene" means any jet fuel, diesel fuel, fuel oil or other petroleum oils derived by refining or processing crude oil or unfinished oils, in whatever type of plant such refining or processing may occur, which has a boiling range at atmospheric pressure from 400° to 550° F.

(4) "Distillate fuel oil" means any fuel oil, gas oil, topped crude oil, or other petroleum oils, derived by refining or processing crude oil or unfinished oils, in whatever type of plant such refining or processing may occur, which has a boiling range at atmospheric pressure from 550° to 1200° F.

(5) "Residual fuel oil" means a petroleum oil, which is (i) any topped crude or viscous residuum of crude or unfinished oils or one or more of the petroleum oils defined in subparagraphs (2) through (4) of this paragraph (g), which has a viscosity of not less than 45 seconds Saybolt Universal at 100° F. to be used as fuel without further processing other than by mechanical blending or (ii) crude oil to be used as fuel without further processing other than by blending by mechanical means.

(6) "Asphalt" means a solid or semi-solid cementitious crude oil or derivative of crude oil, 50 percent or more of the constituents of which are bitumins, which is not to be used as fuel and which is to be used without further processing except airblowing or blending by mechanical means.

(7) "Lubricating oils" means any lubricant containing more than 50 percent by volume of refined petroleum distillates or specially treated petroleum residuum.

(8) "Natural gas products" means liquids (under atmospheric conditions), including natural gasoline, which are recovered by process of absorption, adsorption, compression, refrigeration, cycling, or a combination of such processes, from mixtures of hydrocarbons that existed in a reservoir and which, when recovered and without processing in a refinery or other plant, fall within any of the definitions of products contained in clauses (2) through (4) of this paragraph (g).

(h) "Unfinished oils" means one or more of the petroleum oils listed in clauses (1) through (4) and clause (8) of paragraph (g) of this section or a mixture or combination of such oils, or any component or components of such oils, which are to be futher processed in one or more of the following ways:

(1) By distillation with a resulting yield of at least two distinct finished products or unfinished oils, two of which must be equal to not less than 10 percent of the total charge of such imported unfinished oils to a distillation unit. Different grades or specifications of finished products or unfinished oils will not constitute distinct finished products or unfinished oils for purposes of this subparagraph. Distillation of petroleum oils which have been reconstituted by blending of two or more finished products or unfinished oils does not constitute processing for the purposes of this subparagraph.

(2) By catalytic or thermal conversion in process units such as alkylation, coking, cracking, hydrofining, hydrodesulfurization, polymerization, isomerization, dehydrogenation, or refining.

(3) By physical separation established by means of solvent dewaxing, solvent deasphalting, solvent extraction, or extractive distillation.

(i) As used in paragraphs (g) and (h) of this section, the term "petroleum oil" includes only hydrocarbons derived from crude oil or natural gas.

(j) The term "imports from Canada" as used in this proclamation, means entries for consumption or withdrawals from warehouse for consumption of the following items which have been transported into the United States from Canada, by overland means (pipeline, rail, or other means of overland transportation) or over waterways other than ocean waterways, to-wit: crude oil produced in Canada, unfinished oils which have been derived from crude oil or natural gas produced in Canada, and finished products which have been produced in Canada from crude oil produced in Canada.

(k) The expression "long-term allocation" means:

(1) That certain allocation made to Commonwealth Oil Refining Company, Inc., of imports of crude and unfinished oils into Puerto Rico dated May 10, 1968—effective January 1, 1968 (as amended).

(2) That certain allocation made to Phillips Petroleum Company of imports of unfinished oils into Puerto Rico —dated December 23, 1965—effective January 1, 1966 (as amended).

(3) That certain allocation made to Sun Oil Company of imports of crude oil into Puerto Rico—effective April 18, 1968 (as amended).

(4) That certain allocation made to Union Carbide Corporation of imports of crude oil and unfinished oils into Puerto Rico—dated April 19, 1968—effective April 19, 1968.

(5) That certain allocation made to Hess Oil and Chemical Corporation of imports of finished products into Districts I-IV—dated December 12, 1967—effective January 1, 1968 (Hess Oil and Chemical Corporation now Amerada-Hess).

(l) The term "imports" includes both entry for consumption and withdrawal from warehouse for consumption."

"SEC. 16. Effective as of May 1, 1973, tariffs upon imports of petroleum and petroleum products listed in Schedule 4, Part 10—"Petroleum, natural gas, and products derived therefrom" of the Tariff Schedules of the United States shall be and are suspended."

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of April, in the year of our Lord nineteen hundred seventy-three and of the Independence of the United States of America the one hundred ninety-seventh.

/s/ Richard Nixon

[FR Doc. 73-7776 Filed 4-18-73; 11:29 am]

PROCLAMATION 4341

Modifying Proclamation No. 3279 [1], Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees

By the President of the United States of America

A Proclamation

WHEREAS the Director of the Office of Civil and Defense Mobilization found pursuant to Section 2 of the Act of July 1, 1954, as amended (19 U.S.C. 1352a), "that crude oil and the principal crude oil derivatives and products are being imported in such quantities and under such circumstances as to threaten to impair the national security;" and

WHEREAS, Proclamation No. 3279 as well as modifications thereof, including Proclamation No. 4210 which suspended tariffs on imports of petroleum and petroleum products and established a system of license fees for such imports, was issued pursuant to this finding; and

WHEREAS, although conditions in world oil markets have changed significantly in recent years, the above finding continues to be valid at the present time; and

WHEREAS, the Administrator of the Federal Energy Administration who maintains constant surveillance of imports of petroleum and its primary derivatives in respect to the national security, and who has reviewed the current status of imports under Proclamation No. 3279, as amended, has recommended that the method of adjusting imports of crude oil and the principal crude oil derivatives and products be modified; and

WHEREAS, I agree with this recommendation; and

WHEREAS, pursuant to Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), the Secretary of the Treasury having made an appropriate investigation to determine the effects on the national security of imports of crude oil and the principal crude oil derivatives and products and having considered the matters required by him to be considered by the Trade Expansion Act of 1962, as amended, has reported the findings of his investigation and has advised me that crude oil, the principal crude oil derivatives and products, and related products derived from natural gas and coal tar, are being imported in such quantities and under such circumstances as to threaten to impair the national security and has recommended that I take action to reduce such imports; and

WHEREAS, having considered the matters required by me to be considered by the Trade Expansion Act of 1962, as amended, I agree with the said advice; and

WHEREAS, I find and declare that adjustments must be made in imports of crude oil, the principal crude oil derivatives and products, and related products, so that such imports will not so threaten to impair the national security; and

WHEREAS, I judge it necessary and consistent with the national security to further discourage importation into the United States of petroleum, petroleum products, and related products, in such quantities or under such circumstances as to threaten to impair the national security; to create conditions favorable to domestic crude oil production needed for projected national security requirements; and to increase the capacity of domestic refineries and petrochemical plants to meet such requirements; and to encourage the development of other sources of energy; and

WHEREAS, in order to achieve the above objectives, I determine that a supplemental fee should be imposed on all imports of petroleum and petroleum products, and that certain other changes in the existing license fee system be made; and

WHEREAS, I have instructed the Administrator of the Federal Energy Administration to evaluate the struc-

ture and scope of coverage of those aspects of the existing Mandatory Oil Import Program which are not changed by this Proclamation, and to report to me within three months with his recommendations;

NOW, THEREFORE, I GERALD R. FORD, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the laws of the United States, including Section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim that, effective as of February 1, 1975, a new system of oil import fees is instituted, and accordingly, Proclamation No. 3279, as amended, is hereby further amended as follows:

SECTION 1. Subparagraph (1) of paragraph (a) of section 3 is amended to read as follows:

"SEC. 3(a)(1). Effective February 1, 1975, the Administrator shall issue allocations and licenses subject to fees, on imports of crude oil, unfinished oils, and finished products. Such licenses shall require, among other appropriate provisions, that:

"(i) With respect to imports of crude oil and natural gas products, over and above the levels of imports established in Section 2 of this Proclamation, such fees shall be $0.21 per barrel;

"(ii) With respect to imports of motor gasoline, unfinished oils, and all other finished products (except ethane, propane, butanes, and asphalt), over and above the levels of imports established in Section 2 of this Proclamation, such fees shall be $0.63 per barrel;

"(iii) With respect to imports of crude oil, natural gas products, unfinished oils, and all other finished products (except ethane, propane, butanes, and asphalt) entered into the customs territory of the United States on or after February 1, 1975, there shall be a supplemental fee per barrel, of $1.00, rising to $2.00 on imports entered on or after March 1, 1975, and to $3.00 on imports entered on or after April 1, 1975;

"(iv) With respect to the fees imposed pursuant to paragraphs 3(a)(1)(i)-(iii), the amount of such fees

shall be reduced, on a monthly basis, by an amount equal to any applicable duties paid less any drawbacks received during the same period, except that where duty drawbacks exceed the duty paid during that period, the net differences shall be applied to subsequent periods;

"(v) With respect to all licenses issued prior to the effective date of this Proclamation, such licenses shall be subject to paragraph 3(a)(1)(iii), regardless of whether such licenses were issued as a result of payment of fees or an allocation not subject to fee;

"(vi) With respect to licenses issued prior to the effective date of this Proclamation, not subject to the license fee prescribed in paragraph 3(a)(1)(i)-(ii) or licenses issued by prepayment of such fees, payment of the fees prescribed in paragraph 3(a)(1)(iii) shall be made no later than the last day of the month following the month in which such imports were released from customs custody or entered or withdrawn from warehouse for consumption, whichever occurs first. With respect to licenses subject to the fees prescribed in paragraph 3(a)(1)(i)-(ii) but issued against a surety bond, payment of the fees prescribed in paragraph 3(a)(1)(iii) shall be made simultaneously with payment of the fees prescribed in paragraph 3(a)(1)(i)-(ii). Notwithstanding the provisions of parapraph (b) of Section 3, surety bonds need not be increased to cover the additional fee liability on licenses issued prior to the effective date of this Proclamation;

"(vii) With respect to licenses issued on or after February 1, 1975, for imports entered into the customs territory of the United States prior to April 1, 1975, an amount of fees under paragraph 3(a)(1)(iii) equal to those due on April 1, 1975, shall be payable, subject to refund of the difference between the amount of the fee applicable at the time the imports are entered and the amount already paid;

"(viii) With respect to licenses issued pursuant to paragraph 3(a)(1)(iii) for imports other than (A) crude oil as defined for purposes of the Old Oil Allocation Program which is imported for refining or (B) products refined in a refinery outside of the customs

territory as to which crude oil runs to stills would qualify a refiner to receive entitlements under the Old Oil Allocation Program, the Administrator may by regulation reduce the fee payable by the following amounts, or by such other amounts as he may determine to be necessary to achieve the objectives of this Proclamation and the Emergency Petroleum Allocation Act of 1973:

"—For imports entered into the United States customs territory during the month of February, 1975, $1.00 per barrel;
"—For imports entered during the month of March, 1975, $1.40 per barrel;
"—For imports entered during the month of April, 1975, and thereafter, $1.80 per barrel.

"(ix) With respect to licenses issued pursuant to paragraph 3(a)(1)(i)-(iii), the Administrator:

"(A) With respect to imports of crude oil, to the extent that such imports are refined into products or incorporated into petrochemicals exported from the United States and its territories and possessions, shall refund any fee collected; *provided*, that the Administrator may limit the quantity of exports to which refunds under this provision may be applicable;

"(B) With respect to unfinished oils, may, by regulation, provide for refunds to the extent that such unfinished oils are refined into products or incorporated into petrochemicals which are exported from the United States and its territories and possessions; and

"(C) With respect to petrochemicals, shall specify, by regulation, those petrochemicals which qualify an importer for a refund under this subparagraph."

SEC. 2. In addition to the foregoing amendments, which in themselves are intended to achieve the objectives of this Proclamation, the following additional and conforming amendments are made to Proclamation No. 3279, as amended:

(a) Paragraph (c) of Section 1 is amended to read as follows:

"(c) In Districts I-IV, District V, and in Puerto Rico, no department, establishment, or agency of the United States shall without prior payment of the fees provided for in Section 3(a)(1)(i)-(ii) of this Proclamation, import finished products in excess of the respective allocations made to them by the Administrator. Such allocations shall, except as otherwise provided in this Proclamation, be within the maximum levels of import established in Section 2 of this Proclamation. No such department, establishment, or agency shall be exempt from the fees provided in Section 3(a)(1)(iii)."

(b) Section 2 is amended in the following respects:

(1) The first sentence of paragraph (a) of section 2 preceding subparagraph (1) is amended to read as follows:

"SEC. 2(a). Except as otherwise provided in this Proclamation, the maximum level of imports, from sources other than Canada and Mexico which may be made without prior payment of the fees provided in Section 3(a)(1)(i)-(ii) of this Proclamation, of crude oil, unfinished oils, and finished products (other than residual fuel oil to be used as fuel) shall be:"

(2) Subparagraphs (1), (2), (5) and (6) of paragraph (a) of section 2 are amended by deleting the word "calendar" whenever it appears.

(3) Paragraph (c) of section 2 is deleted, and paragraph (d) is redesignated as paragraph (c).

(4) Subparagraph (1) of paragraph (d) of section 2 preceding the portion of subparagraph (1) designated (i) is amended to read as follows:

"(c)(1) Except as otherwise provided in this Proclamation, the maximum levels of imports from Canada of crude oil and unfinished oils to which license fees under section 3(a)(1)(i)-(ii) are not applicable shall be:"

(5) Subparagraph (1) of paragraph (d) of section 2 is amended in the portions designated (i) and (ii) by deleting the word "calendar" wherever it appears.

(6) Paragraph (c) of section 2 is redesignated as paragraph (d), and is amended by deleting the word "calendar."

(7) Paragraph (f) of section 2 is redesignated as paragraph (c).

(c) Section 3 is amended in the following additional respects:

(1) Subparagraph (2) of paragraph (a) of section 3 is amended in its proviso to read as follows:

"*Provided*, that such rate shall apply also in cases where the holder of the license establishes to the satisfaction of the Administrator that he made a good faith attempt to arrange shipment by vessel under United States registry and that no such vessel was available at reasonable rates for the purpose at the time this shipment was made."

(2) Subparagraph (3) of paragraph (a) of section 3 is amended to read as follows:

"(3) The Administrator is authorized to refund or reduce fees, whether in whole or in part, (i) for payment to the importer of record, on a monthly basis, of sums equal to the sums collected by way of duties, by the United States Customs Service, less any applicable drawback pursuant to paragraph 3(a)(1)(iv); (ii) for payment to the importer of record of the sums required to be refunded by paragraphs 3(a)(1)(vii) and (viii); (iii) where the licensee failed to use, wholly or in part, the license issued to him; (iv) where refunds of license fees, whether in whole or in part, are ordered by the Oil Import Appeals Board; (v) where refund of a license fee, whether in whole or in part, is called for by reason of a person having exported finished products or petrochemicals; (vi) where crude oil imported by virtue of a license for which a fee was paid has been manufactured into asphalt; (vii) where refund of a license fee is called for by reason of the same having been improperly charged."

(3) Paragraph (b) of section 3 is amended to read as follows:

"(b) Applications for allocations and licenses for imports subject to fee under this section shall be accompanied by the applicant's certified check, or a cashier's

check, payable to the order of the Treasurer of the United States in the amount chargeable pursuant to this section, or by a bond with a surety on the list of acceptable sureties on Federal bonds maintained by the Bureau of Government Financial Operations, Department of the Treasury, in a sum not less than the amount chargeable pursuant to this section, conditioned upon payment of such amount to the order of the Treasurer of the United States, by the last day of the month following the month in which such imports were released from customs custody or entered or withdrawn from warehouse, whichever occurs first, or within such other period as the Administrator shall specify. In the event that such bond is terminated or the face value of the bond is reduced below the outstanding liability of licenses issued pursuant to the bond, the Administrator shall immediately revoke all licenses issued pursuant to the bond. Except as to a department, establishment or agency of the United States, applications not accompanied by a certified check, cashier's check, or bond in the amount required shall not be considered. Payment of fees by or for the account of a department, establishment, or agency of the United States shall be accompanied by transfers, as appropriate, from appropriation accounts available to such departments, establishment, or agency, to the suspense account provided by subparagraph (1) of paragraph (c) of this section."

(4) Subparagraph (1) of paragraph (c) of section 3 is amended to read as follows:

"(c)(1) All monies received by the Administrator under the terms of paragraph (b) of this section shall be held by the Administrator in a suspense account and may be drawn upon by the Administrator for the payment of refundable license fees. Balances remaining in such suspense account and not required to be reserved for payments hereinabove provided shall be deposited at the end of each fiscal year in the Treasury of the United States and credited to miscellaneous receipts."

(5) Subparagraph (2) of paragraph (c) of section 3 is redesignated as subparagraph (3) and a new subparagraph (2) is added to paragraph (c) to read as follows:

"(2) Any importer, paying fees pursuant to this section, shall, with respect to each such payment, receive the refunds authorized by subparagraph (1)(iv) of paragraph (a) of this section by submitting to the Administrator, simultaneously with or subsequent to the payment of license fees, such evidence of tariff payment as the Administrator shall specify. Said importer shall also certify the amount of drawback received during the same period for which a refund is requested."

(d) Section 4 is amended in the following respects:

(1) Subparagraphs (1), (2), and (4) of paragraph (b) of section 4 are amended by inserting the phrase "under section 3(a)(1)(i)-(ii)" after the words "license fees" wherever such words shall appear.

(2) Subparagraph (5) of paragraph (b) of section 4 is amended in the first sentence by inserting the phrase "under section 3(a)(1)(i)-(ii)" after the words "license fees", and in the third and fourth sentences by inserting the words "to which fees under section 3(a)(1)(i)-(ii) shall not be applicable" after the word "allocations", wherever such word shall appear.

(4) Paragraph (c) of section 4 is amended by adding, at the end of said paragraph, the following sentence:

"In exercising this authority the Administrator will consult with the Secretaries of State, Treasury, and Defense, as appropriate."

(5) Paragraph (d) of section 4 is deleted.

(c) Section 5 is amended in the following respects:

(1) Paragraph (a) of section 5 is amended by deleting the last sentence.

(2) Paragraph (b) of section 5 is amended in clause (1) of the first sentence by deleting the words "on applications for allocations of imports under such regulations," and by inserting the words "under implementing regulations," in the last sentence by deleting the word "fee" and inserting the words "from the fees established in section 3(a)(i)-(ii)", and by adding a new sentence after the last sentence to read as follows: "Any allocations granted by the Board, however, shall be subject to payment of the fees established in section 3(a)(1)(iii)."

(f) Section 10 is redesignated as section 7 and is amended to read as follows:

"SEC. 7. The Administrator shall provide policy direction, coordination, and surveillance of the mandatory oil import program, and shall, from time to time, in consultation with the Secretaries of State and the Treasury and other federal agencies as appropriate, review the status of imports and petroleum and its primary derivatives in respect to the national security. In this connection, he shall inform the President of any circumstances which might indicate the need for further Presidential action under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended."

(g) Section 11 is redesignated as section 8 and is amended by adding after the words "fee" or "fees", wherever they shall appear, the phrase "under section 3(a)(1)(i)-(ii)", and by deleting the proviso.

(h) Section 12 is redesignated as section 9, and is amended by substituting a comma for the period, and by adding the words "except that all such allocations shall be subject to the payment of fees prescribed by section 3(a)(i)(iii) of this Proclamation.

(i) Section 13 is redesignated as section 10.

(j) Section 14 is deleted.

(k) Section 15 is redesignated as section 11 and is amended by adding, after the last paragraph, the following paragraphs:

"(m) The term 'Administrator' means the Administrator of the Federal Energy Administration, or his delegate.

"(n) The term 'Old Oil Allocation Program' means the program adopted pursuant to the Emergency Petroleum Allocation Act of 1973 for Allocation of Old Oil, 39 F.R. 42246 (December 4, 1974), 10 C.F.R. 211.67."

(l) Section 16 is redesignated as section 12, and is amended to read as follows:

"SECTION 12. Effective with respect to articles entered, or withdrawn, from warehouse for consumption

on or after February 1, 1975, tariffs upon imports of petroleum products listed in schedule 4, part 10—"Petroleum, natural gas, and products derived therefrom" —of the Tariff Schedules of the United States shall be and are reinstated."

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of January, in the year of our Lord nineteen hundred seventy-five, and of the Independence of the United States of America the one hundred and ninety-ninth.

/s/ Gerald R. Ford

PROCLAMATION 4355

Modifying Proclamation 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees

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By the President of the United States of America

A Proclamation

WHEREAS, I judge it necessary and consistent with the national security, taking into account the economic welfare of the Nation, that provision be made to defer scheduled increases in the fees applicable to imported petroleum and petroleum products for a period of two months; and

WHEREAS, it is my intention, that refiners located in territories of the United States, and in foreign trade zones, shall participate in the Mandatory Oil Import Program upon terms not less favorable than domestic refiners; and

WHEREAS, in order to facilitate such treatment, it is necessary that the Administrator of the Federal Energy Administration be authorized to determine at what point the oil import license fees effective February 1, 1975 shall be deemed to apply with respect to crude oil entered into such territories and zones; and

WHEREAS, I judge it necessary to permit a system for the receipt by Puerto Rico of sums equivalent to the license fees on petroleum consumed in Puerto Rico, to be appropriated by the Commonwealth for the benefit of individuals and corporations resident therein, comparable to the system which I have proposed for other parts of the United States;

NOW, THEREFORE, I, GERALD R. FORD, President of the United States of America, acting under and

by virtue of the authority vested in me by the Constitution and the laws of the United States, including Section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim that, effective as of February 1, 1975, Proclamation No. 3279, as amended, is hereby further amended as follows:

Section 1. Subparagraphs (iii), (iv), and (viii) of subparagraph (1) of paragraph (a) of section 3 are amended to read as follows:

"(iii) with respect to imports of crude oil, natural gas products, unfinished oils, and all other finished products (except ethane, propane, butanes, and asphalt) entered into the customs territory of the United States on or after February 1, 1975, there shall be a supplemental fee per barrel of $1.00, rising to $2.00 on imports entered on or after May 1, 1975, and to $3.00 on imports entered on or after June 1, 1975;

(iv) with respect to the fees imposed pursuant to paragraphs 3(a)(1)(i)-(iii), the amount of such fees shall be reduced, on a monthly basis, by an amount equal to any applicable duties paid less any drawbacks received during the same period, except that where duty drawbacks exceed the duty paid during that period, the net differences shall be applied to subsequent periods; provided that when the duty less drawbacks exceeds the fee imposed, the Administrator may provide that any excess may be used to reduce fees payable in subsequent months, such extended period not to exceed six months;

(viii) with respect to licenses issued pursuant to paragraph 3(a)(1)(iii) for imports other than (A) crude oil as defined for purposes of the Old Oil Allocation Program which is imported for refining or (B) products refined in a refinery outside of the customs territory as to which crude oil runs to stills would qualify a refiner to receive entitlements under the Old Oil Allocation Program, the Administrator may by regulation reduce the fee payable by the following amounts, or by such other amounts as he may determine to be necessary to achieve the objectives of this Proclamation and the Emergency Petroleum Allocation Act of 1973:

—for imports entered into the United States customs territory during the months of February, March and April, 1975, $1.00 per barrel;

—for imports entered during the month of May, 1975, $1.40 per barrel;

—for imports entered during the month of June, 1975, and thereafter, $1.80 per barrel."

Section 2. Paragraph (a) of section 3 is amended by adding subparagraph (5) to read as follows:

"(5) In order to ensure that refiners located in territories of the United States and in foreign trade zones are treated not less favorably than other United States refiners, the Administrator shall by regulation determine at what point crude oil, unfinished oils and finished products shipped into United States territories and foreign trade zones shall become subject to the fees imposed pursuant to paragraphs 3(a)(1)(i)-(iii)."

Section 3. Subparagraph (1) of paragraph (a) of Section 3 is amended by adding clause (x) to read as follows:

"(x) The Administrator shall by regulation reduce the fees payable by importers pursuant to paragraphs 3(a)(1)(i)-(iii) with respect to crude oil, unfinished oils, and finished products imported into Puerto Rico, or imported into Districts I-V and shipped to Puerto Rico, with or without further processing, and not shipped to Districts I-V, as crude oil, unfinished oils, or finished products, by the amount of any excise tax or other levy imposed and collected by the Government of Puerto Rico on such materials, *Provided* that refunds from or reductions in such excise tax or other levy are authorized in the same manner as are authorized with respect to payments prescribed by paragraphs 3(a)(1)(i)-(iii), *Provided further* that with respect to shipments to Puerto Rico from Districts I-V such shipments shall be deemed attributable to imported crude."

IN WITNESS WHEREOF, I have hereunto set my hand this fourth day of March, in the year of our Lord nineteen hundred seventy-five, and of the Independence

of the United States of America the one hundred and ninety-ninth.

/s/ Gerald R. Ford

PROCLAMATION 4370

[April 30, 1975]

Modifying Proclamation No. 3279, As Amended, Relating To Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees

By the President of the United States of America

A Proclamation

WHEREAS, I judge it necessary and consistent with the national security that the Mandatory Oil Import Program maintain flexibility to accommodate evolving programs for discouraging importation into the United States of petroleum and petroleum products in such quantities or under such circumstances as threaten to impair the national security; and

WHEREAS, a temporary deferral of the scheduled increases in oil import license fees is appropriate in order to maintain such flexibility; and

WHEREAS, I intend to act within thirty days to increase the oil import license fees to their originally scheduled levels of $2 and $3 should alternative programs for discouraging imports not be formulated in a timely fashion or should such programs fail to protect adequately United States national security interests;

NOW, THEREFORE, I, GERALD R. FORD, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the laws of the United States, including Section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim that, effective as of May 1, 1975, Proclamation No. 3279, as amended, is hereby further amended as follows:

SECTION 1. Clause (iii) of subparagraph (1) of paragraph (a) of Section 3 is amended to read as follows:

"(iii) with respect to imports of crude oil, natural gas products, unfinished oils, and all other finished products (except ethane, propane, butanes, and asphalt) entered into the customs territory of the United States on or after February 1, 1975, there shall be a supplemental fee per barrel of $1.00."

SEC. 2. Clause (viii) of subparagraph (1) of paragraph (a) of Section 3 is amended to read as follows:

"(viii) with respect to licenses issued pursuant to paragraph 3(a)(1)(iii) for imports other than (A) any material imported for refining that qualifies for inclusion in a refiner's crude oil runs to stills under the Old Oil Allocation Program or (B) products refined in a refinery outside of the customs territory as to which crude oil runs to stills would qualify a refiner to receive entitlements under the Old Oil Allocation Program, the Administrator may by regulation reduce the fee payable for imports entered on or after February 1, 1975, by $1.00 per barrel, except that the Administrator may reduce such fee by such other amounts as he may determine to be necessary to achieve the objectives of this Proclamation and the Emergency Petroleum Allocation Act of 1973."

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord nineteen hundred seventy-five, and of the Independence of the United States of America the one hundred and ninety-ninth.

/s/ Gerald R. Ford

PROCLAMATION 4377

[May 27, 1975]

Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees

By the President of the United States of America

A Proclamation

WHEREAS, pursuant to the authority of Section 232 of the Trade Expansion Act of 1962, Proclamation No. 3279, as amended, was modified by Proclamation No. 4341 of January 23, 1975, in order to impose a system of supplemental license fees on imported petroleum and petroleum products; and

WHEREAS, the system of supplemental license fees on imported petroleum and petroleum products was imposed pursuant to an investigation and recommendation by the Secretary of the Treasury in accordance with the provisions of Section 232 of the Trade Expansion Act of 1962; and

WHEREAS, the scheduled increases in the level of fees established by Proclamation No. 4341 were deferred by Proclamation No. 4370 of April 30, 1975, in order to afford Congress an opportunity to propose alternative programs for discouraging importation into the United States of petroleum and petroleum products in such quantities or under such circumstances as threaten to impair the national security; and

WHEREAS, such alternative programs have not been developed and are unlikely to be enacted in the near future; and

WHEREAS, I judge it necessary and consistent with the national security to reinstitute the originally sched-

uled increase in the supplemental fee to the level of $2.00 per barrel; and

WHEREAS, the Administrator of the Federal Energy Administration has recommended that certain other changes in the license fee system be made;

NOW, THEREFORE, I, GERALD R. FORD, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the laws of the United States, including Section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim that, effective as of June 1, 1975, Proclamation No. 3279, as amended, is hereby further amended as follows:

SECTION 1. (a) Clauses (iii), (iv), and (viii) of subparagraph (1) of paragraph (a) of Section 3 are amended to read as follows:

"(iii) with respect to imports of crude oil, natural gas products, unfinished oils, and all other finished products (except ethane, propane, butanes, and asphalt) entered into the customs territory of the United States on or after February 1, 1975, there shall be a supplemental fee per barrel of $1.00, rising to $2.00 on imports entered on or after June 1, 1975;

"(iv) with respect to the fees imposed pursuant to paragraphs 3(a)(1)(i)-(iii), the amount of such fees shall be reduced, on a monthly basis, by an amount equal to any applicable duties paid less any drawbacks received during the same period charged against imports made on or after February 1, 1975 except that where duty drawbacks exceed the duty paid during that period, the net differences shall be applied to subsequent periods; provided that when the duty less drawbacks exceeds the fee imposed, the Administrator may provide that any excess may be used to reduce fees payable in subsequent months, such extended period not to exceed six months;

"(viii) with respect to licenses issued pursuant to paragraph 3(a)(1)(iii) for imports other than (A) any material imported for refining that qualifies for inclu-

sion in a refiner's crude oil runs to stills under the Old Oil Allocation Program or (B) products refined in a refinery outside of the customs territory as to which crude oil runs to stills would qualify a refiner to receive entitlements under the Old Oil Allocation Program, the Administrator may by regulation reduce the fee payable by the following amounts, or by such other amounts as he may determine to be necessary to achieve the objectives of this Proclamation and the Emergency Petroleum Allocation Act of 1973;

—for imports entered into the United States customs territory during the months of February through May, 1975, $1.00 per barrel;

—for imports entered during the month of June, 1975, and thereafter, $1.40 per barrel."

(b) Paragraph (b) of Section 3 is amended by redesignating the existing paragraph (b) as (b)(1), and by adding a new paragraph (2) to read as follows:

"(2) With respect to allocations and licenses issued prior to June 1, 1975, for which a bond was not required or with respect to which a bond was required in amounts less than the full amount of the fees imposed pursuant to this Proclamation, the Administrator may, by regulation, provide for such bonding procedures as he deems necessary."

SEC. 2. (a) Paragraph (c) of Section 5 is amended to read as follows:

"(c) The Administrator of the Federal Energy Administration may modify or alter the composition of the Appeals Board or abolish the Board and establish such other appellate procedures as he deems appropriate."

(b) A new paragraph (d) is added to Section 5 to read as follows:

"(d) The authority granted by this Section shall expire on April 30, 1980."

SEC. 3. Paragraph (1) of Section 11 is amended to read as follows:

"(1) The term 'imports' includes both entry for consumption and withdrawal from warehouse for consump-

tion, but excludes unfinished oils and finished products processed in United States territories and foreign trade zones from crude oil produced in the United States."

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of May, in the year of our Lord nineteen hundred seventy-five, and of the Independence of the United States of America the one hundred ninety-ninth.

/s/ Gerald R. Ford

THE SECRETARY OF THE TREASURY

Washington 20220

[SEAL]

January 14, 1975

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Report on Section 232 Investigation on Petroleum Imports

This report is submitted to you pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and results from an investigation that I initiated under that Section for the purpose of determining whether petroleum * is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

At the present time, the demand for petroleum in the United States is 18.7 million barrels per day. Of this amount, imports provide 7.4 million barrels daily. The deficit in petroleum production compared with demand has grown since 1966, when the United States ceased to be self-sufficient.

Our increasing dependence upon foreign petroleum had, by 1973, created a potential problem to our economic welfare in the event that supplies from foreign sources were interrupted. Its adverse contribution to our balance of payments position had also significantly increased, and for the year 1973 the outflow in payments for the purchase of foreign petroleum was running at $8.3 billion annually only partially offset by exports of petroleum products.

In September 1973, the worsening petroleum import situation was further seriously aggravated by an embargo on crude oil imposed by the Organization of Petroleum Exporting Countries, which effectively kept 2.4 million needed barrels of oil per day from U. S. shores.

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* The term "petroleum", as used in this report, means crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar.

After the initiation of the embargo, the price of imported oil quadrupled from approximately $2.50 per barrel to approximately $10.00 per barrel and has since that time risen somewhat further. Simultaneously, the balance of payments problem deteriorated by reason of the increased oil bill paid by United States consuming interests. Today the outflow of payments for petroleum is running at a rate of $25 billion annually.

As a result of my investigation, I conclude that the petroleum consumption in the United States could be reduced by conserving approximately one million barrels per day without substantially adversely affecting the level of economic activity in the United States. Any sudden supply interruption in excess of this amount, however, and particularly a recurrence of the 2.4 million barrel per day reduction which occurred during the OPEC embargo, would have a prompt substantial impact upon our economic well-being, and, considering the close relation between this nation's economic welfare and our national security, would clearly threaten to impair our national security.

Furthermore, in the event of a world-wide political or military crisis, it is not improbable that a more complete interruption of the flow of imported petroleum would occur. In that event, the total U. S. production of about 11 million barrels per day might well be insufficient to supply adequately a war-time economy, even after mandatory conservation measures are imposed. As a result, the national security would not merely be threatened, but could be immediately, directly and adversely affected.

In addition, the price at which oil imports are now purchased causes a massive payments outflow to other countries. The inevitable result of such an outflow is to reduce the flexibility and viability of our foreign policy objectives. For this reason, therefore, a payments outflow poses a more intangible, but just as real, threat to the security of the United States as the threat of petroleum supply interruption. On both grounds, decisive action is essential.

FINDINGS

As a result of my investigation, I have found that crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar are being imported into the United States in such quantities as to threaten to impair the national security. I further find that the foregoing products are being imported into the United States under such circumstances as to threaten to impair the national security.

RECOMMENDATIONS

I therefore recommend that appropriate action be taken to reduce imports of crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar into the United States, to promote a lessened reliance upon such imports, to reduce the payments outflow and to create incentives for the use of alternative sources of energy to such imports. I understand that a Presidential Proclamation pursuant to Section 232 of the Trade Expansion Act of 1962 is being drafted by the Federal Energy Administration consistent with these recommendations.

/s/ William E. Simon
WILLIAM E. SIMON

DEPARTMENT OF THE TREASURY

REPORT OF INVESTIGATION OF EFFECT OF PETROLEUM IMPORTS AND PETROLEUM PRODUCTS ON THE NATIONAL SECURITY PURSUANT TO SECTION 232 OF THE TRADE EXPANSION ACT, AS AMENDED

By

The Assistant Secretary of the Treasury
for Enforcement, Operations and Tariff Affairs,
David R. Macdonald

January 13, 1975

REPORT OF INVESTIGATION UNDER SECTION 232 OF THE TRADE EXPANSION ACT, AS AMENDED, 19 U.S.C. 1862

I. *INTRODUCTION AND SUMMARY*

This investigation is being conducted at the request of and on behalf of the Secretary of the Treasury pursuant to his authority under Section 232 of the Trade Expansion Act (the "Act"), as amended, 19 U.S.C. 1862. (Annex A) The purpose of the investigation is to determine whether crude oil, crude oil derivatives and products, and related products derived from natural gas and coal tar are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. Under 31 CFR 9.3, the Assistant Secretary of the Treasury for Enforcement, Operations, and Tariff Affairs is responsible for making this investigation.

The Secretary of the Treasury has determined pursuant to Section 232 that it would be inappropriate to hold public hearings, or otherwise afford interested parties an opportunity to present information and advise relevant to this investigation. He has also determined pursuant to his authority under 31 CFR 9.8 that national security interests require that the proceedings providing for public notice and opportunity for public comment set forth at 31 CFR Part 9 not be followed in this case. (Annex A)

In conducting the investigation, information and advice have been sought from the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States to determine the effects on the national security of imports of the articles which are the subject of the investigation. Information and advice have been received from the Departments of State, Defense, Interior, Commerce, Labor, the Council of Economic Advisers, and the Federal Energy Administration. (Annex B)

In summary, the conclusion of this report is that petroleum *is* being imported in such quantities and under

such circumstances as to threaten to impair the national security of this country.

Petroleum is a unique commodity: it is essential to almost every sector of our economy, either as a raw material component or as the fuel for processing or transporting goods. It is thus essential to the maintenance of our gross national product and overall economic health. Only a small percentage of present U.S. petroleum imports could be deemed to be secure from interruption in the event of a major world crisis. The quantity of petroleum imports, moreover, is now such a high percentage of total U.S. consumption that an interruption larger than one million barrels per day at the present time would adversely affect our economy. If our imports not presently deemed to be secure from interruption were in fact kept from our shores, the effect on the U.S. economy would be staggering and would clearly reach beyond a matter of inconvenience, or loss of raw materials and fuel for industries not essential to our national security. The outflow in payments for petroleum also poses a clear threat not only to our wellbeing, but to the welfare of our allies. As the State Department has concluded, the massive transfer of wealth greatly enhances the economic and political power of oil rich states who do not necessarily share our foreign policy objectives, and correspondingly tends to erode the political power of the United States and its allies.

The purpose of this investigation under Section 232 of the Act is to determine the effects of our level of imported petroleum upon our national security and not to fashion a remedy. Nevertheless, it would appear that we must, over the longer term, wean ourselves away from a dependence upon imported oil, conserve our use of petroleum, promote the use of alternative sources of energy, and at least in part, stanch the outflow of payments resulting from our purchases of this commodity. As Secretary Kissinger states:

> "Clearly, decisive action is essential. We have signalled our intention to move toward energy self-sufficiency. We must now demonstrate with action the strength of our commitment. In the short-term, our only viable economic policy option is an effective program of energy conservation. A vigorous United States lead on conservation will encourage similar action by other consuming nations. Consumer cooperation on conservation now and then development of new supplies over time will deter producer aggressiveness by demonstrating that consumers are capable of acting together to defend their interests."

II. *STATUTORY CONSIDERATIONS*

This investigation has proceeded in recognition of the close relationship of the economic welfare of the Nation to our national security. As required by Section 232, consideration has been given to domestic production of crude oil and the other products under investigation needed for projected defense requirements, the existing and anticipated availability of these raw materials and products which are essential to the national defense, the requirements of the growth of the domestic petroleum industry and supplies of crude oil and crude oil products, and the importation of goods in terms of their quantities, availabilities, character and use as those affect the domestic petroleum industry and the ability of the United States to meet its national security requirements.

In addition, other relevant factors required or permitted by Section 232 have been considered, including the amount of current domestic demand for petroleum and petroleum products which is being supplied from foreign sources, the degree of risk of interruption of the supply of such products from these countries, the impact on the economy and our national defense of an interruption of such supplies including the effects on labor, and the effect of the prices charged for foreign petroleum and petroleum products on our national security.

III. *IMPORTS OF PETROLEUM AND PETROLEUM PRODUCTS*

During the first eight months of 1974, the United States imported approximately 5.8 million barrels per day of petroleum and petroleum products. (Annex C) This figure amounted to 35.6 percent of total United States demand for such products during this period. The latest data available indicates that United States dependence on imported oil is growing. For the four weeks ending December 13, 1974, the United States imported about 7.4 million barrels per day of petroleum and petroleum products, which represented 39.5 percent of total United States demand for such products during the same period. (Annex C)

Imports into the United States may be divided into two major sources, the nations belonging to the Organization of Petroleum Exporting Countries (OPEC) and other nations. (Annex D) The OPEC nations have far more production capacity than the non-OPEC nations. Of the world's total production of approximately 55 million barrels per day, OPEC members produce 30 million barrels, Communist countries 11 million and the balance of 14 million barrels per day is produced by other countries including the U.S.[1] Moreover, the OPEC countries have over 8 million barrels per day of production potential which is not being utilized while virtually no unused capacity exists in the rest of the world.[2]

Most recent indicators show that 3.5 million barrels per day of crude oil and petroleum products are being imported by the U.S. directly from the OPEC member states. (Annex D) In addition, as much as 850,000 barrels per day of finished products imported into the U.S. from third country sources may originate from OPEC nations.[3] In total, 4.35 million barrels per day of the 1974 U.S.

[1] Treasury sources, Office of Energy Policy.

[2] Treasury sources, Office of Energy Policy.

[3] Treasury estimate, Office of Energy Policy.

demand of approximately 17.0 million barrels per day came from OPEC sources. In percentage terms, U.S. imports from OPEC members account for over 25% of domestic demand.

The major Western Hemisphere suppliers of petroleum to the United States are Canada and Venezuela. The latter country provided the United States with approximately 1.1 million barrels per day from January through October 1974. For the same period, Canada exported to the U.S. over 1,000,000 barrels per day or slightly over 17% of our imported supplies.

The Canadian Government has recently conducted a study of its own energy potential. It concluded that steps should be taken to reduce exports of oil with a view to conserving petroleum for future Canadian requirements.[4] Accordingly, on November 22, 1974, the Canadian Government announced its intention to limit exports to the U.S. to 650,000 barrels per day by the end of 1975. Further reductions in exports will take place after annual reviews. As a result, it appears that the U.S. can no longer count on the availability of large volumes of oil from Canada but may have to increase our reliance on OPEC to make up for the reduction of Canadian imports.

In summary, 60 percent of current imports of crude oil comes directly from OPEC members and another 15 percent is refined by third countries using OPEC crude oil. At least 85% of the imported petroleum, however, whether from OPEC or non-OPEC countries, appears to be subject to the threat of interruption in the event of a crisis. Moreover, the outlook in the short run is for the percentage of imports derived from OPEC members to increase as a result of limitations on Canadian exports.

IV. *EFFECT OF* 1973-1974 *EMBARGO ON THE DOMESTIC ECONOMY*

The interruption of the supply of a major part of U.S. imports of petroleum during the Winter of 1973-74 had

[4] Statement of Donald S. MacDonald, Minister of Energy, Mines and Resources, on Canadian Oil Supply and Demand. Press Release November 22, 1974.

a serious adverse impact on the economy of the United States.

In his memorandum, Secretary Dent stated:

> "The experience of the Arab oil embargo last year, even though it halted only about one-half of our oil imports, confirms the risk of disruption to the economy which is implicit in dependence on imports of oil to this degree. The oil embargo is believed to have produced a reduction in U.S. GNP by some $10 to 20 billion. All sectors of the economy were adversely affected, with the consumer durables sector and housing construction most heavily hit. Further, it is estimated that a substantial part of the inflationary rise of prices during 1974, particularly in the first half, is attributable to the direct and indirect effects of the rise in overall energy costs which followed the rapid escalation of costs for Arab oil. In view of this record of injury caused by loss of foreign oil supply and our continuing vulnerability to future injury of even greater impact, it is my opinion that imports at current and projected levels do constitute a threat to impair the national security."

The Federal Energy Administration noted in its Project Independence report that the embargo's impact was serious as a result of the nation's high level of dependence upon foreign petroleum imports. In the years 1960 through 1973 U.S. production did not keep pace with U.S. consumption of petroleum. The resulting gap represented the level of U.S. imports, which increased drastically:

U. S. Production and Consumption of Petroleum [1]
(1960-73)

Petroleum (Millions) Barrels/Day)

Year	Production	Consumption	Gap (Imports)
1960	8.0	9.5	1.5
1965	8.8	10.8	2.0
1970	11.3	14.7	3.4
1972	11.2	16.4	5.2
1973	10.9	17.3	6.4

[1] Federal Energy Administration, Project Independence Report, Appendix at 284 (November 1974).

The impact of the embargo on imports can be shown by a comparison of import figures for both crude and refined oil imports for each of the months September 1973 through February 1974, and the percent change reflected in such figures from the same months of the preceding year:

Monthly Imports
Before and During the Oil Embargo [2]
(Millions Barrels/Day)

	Crude Oil	% Change from Previous Year	Total Refined Products	% Change from Previous Year
Sept 1973	3.47	+47	2.65	+26
Oct	3.86	+49	2.67	+ 9
Nov	3.45	+50	3.14	+30
Dec	3.99	+45	2.90	+ 1
Jan 1974	2.46	−13	2.85	− 4
Feb	2.10	−22	2.55	+17*

* The indicated positive balance in this month is reflected by the disproportionately large imports of motor gasoline, to accomodate critical shortages of this refined product.

Both the National Petroleum Council and the Federal Energy Administration have made detailed analyses of the impact of the 1973-74 embargo. A demand reduction of over 1 million barrels per day has been attributed to curtailment and conservation. These savings occurred in areas which caused minimum individual or collective hardship. However, many such savings were the result of one-time only reductions in usage patterns, such as lowering of thermostat levels. Once accomplished, by voluntary or other restraints upon energy usage, such savings cannot thereafter be duplicated.

The cost of the embargo to the economy, in terms of both increased energy costs and adverse impacts on the labor market, was severe. During the first quarter of 1974, the seasonally adjusted Gross National Product fell by 7% and the seasonally adjusted unemployment rate changed from 4.6% in October 1973 to 5.1% by March of 1974. Of course there were other factors at work in

[2] *Ibid.* at 285.

the economy during this period and it is difficult to isolate those declines attributable solely to the embargo. However, according to the FEA, increased energy prices during the embargo period were responsible for at least 30% of the increase in the Consumer Price Index with the long-term effects of the embargo and the subsequent price rises continuing after the embargo was lifted. As the FEA has pointed out, a comparison of the nation's economic performance for the two years preceding the embargo with the first quarter of 1974 demonstrates a clear and uninterrupted upward historical trend (albeit a reduced rate of increase beginning in the second quarter of 1973) followed by a sudden sharp decline during the relevant period:

Gross National Product Statistics [3]
(1972-1974)

	Real GNP [a]	Present Changes in GNP from Preceding Quarter (Annual Rate)
1972—I	768.0	
II	785.6	9.5
III	796.7	5.7
IV	812.3	8.0
1973—I	829.3	8.6
II	834.3	2.4
III	841.3	3.4
IV	844.6	1.6
1974—I	831.0	−6.3

[a] Seasonably adjusted at annual rates in billions of 1958 dollars.

A similar effect has been identified by FEA with respect to real personal consumption expenditures and real fixed investments. These are set forth in detail in the Appendix to the Project Independence Report, and are not set forth in detail herein.

The Department of Commerce has forecast a decline in real output for the first quarter of 1975 of $10.4 bil-

[3] *Ibid.* at 289.

lion, projected to increase to $15 billion by the second quarter 1975.[4] Again, studies showing detailed effects upon the labor market and contributions to changes for selected items within the CPI have been analyzed in detail by the Department of Commerce and the Federal Energy Administration, and set forth in the Project Independence Report.

The adverse change of .5% in the seasonally adjusted national unemployment rate between October 1973 and March 1974 represents an increase of approximately 500,000 unemployed people. The Department of Labor has estimated that during the period of embargo 150,000 to 225,000 jobs were lost as a direct result of employers' inability to acquire petroleum supplies. An additional decline of approximately 310,000 jobs occurred as an indirect result of such shortages in industries whose products or processes were subject to reduced demand as a result thereof (most notably, the automobile industry). The Department of Labor estimates that 85% of the total jobs lost were those of semi-skilled workers, 5% clerical and 3% professional, technical and skilled.[5]

The Federal Energy Administration has projected the loss in economic activity (GNP) which could be reasonably correlated to a shortfall in oil supplies. The pattern of this correlation indicates that at any given time, the economy can absorb a modest reduction in consumption before painful reductions in economic activity occur. After this reduction in nonessential uses of oil is made, further reductions of oil supplies will result in sharply increasing losses in the GNP. Based on such models, the FEA has determined the impacts of interruption of imports under several conditions. For example, a recently calculated situation shows that a 2.2 billion bbl/day import reduction for six months' duration is estimated to cause a $22.4 billion reduction in GNP.[6]

[4] *Ibid.* at 291.

[5] *Ibid.* at 296.

[6] Federal Energy Administration, Office of Economic Impact, The Potential Economic Costs of Future Disruptions of Crude Oil Imports, at 11 (December 23, 1974).

The Federal Energy Administration estimates that a reduction in consumption of approximately 1 million barrels per day can be managed without imposing prohibitive costs on the economy. While recognizing that a figure of 1 million barrels per day is not precise, it does approximate a reasonable estimate of the short-term reduction beyond which more severe economic readjustments would take place. Of the 17 million barrels per day current demand, it is estimated that 16 million is the proximate quantity required to prevent progressive deterioration of the economy at the present time.

It should also be noted that the impacts of any supply interruptions will be disproportionately felt in the various regions of the country. The major determinants of the impact within any given region is the amount of imports into that region, climatic conditions of the region, and the industries located there. The northwestern and northeastern parts of the country import large amounts of their petroleum requirements, the climatic conditions require them to use more energy for heating than other regions, and they have more energy using manufacturing industries in general than other parts of the country (this is especially true of the Northeast).

The direct effects of an embargo would be concentrated in PAD (Petroleum Administration for Defense) Districts 1 and 5. PAD District 1 includes the Eastern Seaboard of the U.S. where it is estimated that 83 percent of the 1975 crude petroleum demand will be imported. In PAD District 5, the West Coast of the U.S. including Alaska and Hawaii, imports are 43 percent of total uses. The East Coast problem is especially difficult because of the high fuel oil demands in the New England area and the fact that approximately 98 percent of the residual fuel oil for PAD District 1 is imported as a refined product or made from imported crude.[7]

[7] *Ibid.* at 3.

V. *VULNERABILITY OF OIL TO U.S. ECONOMY AND ALTERNATE ENERGY SOURCES*

The vulnerability of the U.S. economy to petroleum supply interruptions is highlighted by (1) the fact that it is the backbone, not only of our defense energy needs, but also of our economic welfare, and (2) the difficulty of bringing in alternate energy sources immediately.

Although there may have been some recent minor changes, the 1973 figures show that petroleum accounted for 46 percent of domestic energy consumption, natural gas for 31 percent, coal for 18 percent, hydropower for 4 percent and nuclear for 1 percent. (Annex E)

The degree to which other energy forms can in the short run be physically substituted for oil is limited. Residual oil used in heating or utilities can be replaced with coal only after conversion of the plant's combustion facilities has taken place. Other energy sources are limited in supply or feasibility of use. Supplies of natural gas are declining and an interstate pipeline curtailment of 919 billion cu. ft. is expected in the 1974-75 heating season.[1] The natural gas reserve/production ratio has declined from 21.1 in 1959 to 11.1 in 1973,[2] indicating the production potential is seriously impaired. It does not appear that we can substitute natural gas for oil. On the contrary, the prospects are that either oil or coal may have to be substituted for natural gas. The nation's ability to increase its hydroelectric power generating capacity is severely limited. Other energy sources such as nuclear electrical generating power require long lead times for development and will not be available in materially increased quantities for a number of years. For example, nuclear power is not expected to reach a significant per-

[1] Federal Power Commission, Staff Report, Requirements and Curtailments of Major Interstate Pipeline Companies Based on Form 16 Report (November 15, 1974).

[2] Report of a subcommittee of the House Committee on Banking and Currency on Oil Imports and Energy Security: An Analysis of the Current Situation and Future Prospects; 93rd Cong., 2d Sess. at 28 (September 1974).

centage (12%) of our total energy capacity until 1985.[3] The availability of coal is subject to further mine development, expansion of transportation systems and convertibility of furnaces and boilers, all of which require significant development time. Moreover, both the production and combustion of coal is currently subject to environmental restrictions which further limit its accelerated development as an energy source.

The outlook for increasing production of crude oil from domestic sources is not favorable for the near term. Domestic production has declined from 9.6 million barrels per day in 1970 to 8.7 million barrels per day in December 1974. A further gradual decline is anticipated until oil from the North Slope of Alaska becomes available in late 1977, or until oil is produced from presently undeveloped areas as the Outer Continental Shelf. Nevertheless, the sharp increase in the price of oil should stimulate increased exploration which, in the intermediate or longer term, if combined with conservation efforts should ameliorate the present threat to our economy.

Also, long-term energy sources such as the development of geothermal and oil shale energy resources and the practical utilization of solar energy require major advances in the technology involved. This technology may take several years to develop, but should assist in the solution of the domestic shortage of energy sources if sufficient incentive is provided.

VI. *THREAT TO THE NATIONAL SECURITY OF FUTURE SUPPLY INTERRUPTIONS*

Section IV has described the serious impact on the national economy and consequently on the national security of the winter 1973-1974 embargo. It is reasonable to expect similar or even worse effects of an interruption of supply in the future, particularly in light of increasing dependence on foreign sources of supply. U.S. production is declining[1] and alternative sources of energy supply require a long lead time for development.[2] Moreover, supplies from the most secure Western Hemisphere sources are likely to decline as illustrated by the Canadian action to reduce oil exports to the United States.

[3] Federal Energy Administration, Project Independence Report, at 30 (November 1974).

The Department of Defense has described the risks to our national security posed by the threat of a future supply interruption. The Department of Defense, in its memorandum to me of January 9, 1975, stated:

> "The Department of Defense holds that this nation must have the capability to meet the essential energy requirements of its military forces and of its civil economy from secure sources not subject to military, economic or political interdiction. While it may be that complete national energy self-sufficiency is unnecesary, the degree of our sufficiency must be such that any potential supply denial will be sustainable for an extended period without degradation of military readiness or operations, and without significant impact on industrial output or the welfare of the populace. This is true because the national security is threatened when: (1) the national economy is depressed; (2) we are obliged to rely on non-secure sources for essential quantities of fuel; (3) costs for essential fuels are unduly high; and (4) we reach a point where secure available internal fuel resources are exhausted.
>
> "As you know, the Mandatory Oil Import Program was established in 1959 for the express purpose of controlling the quantity of imported oil which at that time had been found to threaten to impair the national security. In the intervening years we have observed with growing concern the decline in domestic and western hemisphere petroleum productive capacity in relation to demand. The result has

[1] Federal Energy Administration, Project Independence Report at 5 (November 1974). See figures set forth in Annex F.

[2] See discussion of alternative energy sources in Section V. See also Federal Energy Administration, Project Independence Report at 6 (November 1974).

been a rapid expansion in our dependence on eastern hemisphere sources for the oil which is so essential to our military needs and the nation's economy. By 1973 that dependence had reached a level which risked substantial harm to the national economy in event of a peacetime supply denial. In event of general war, those risks would be substantially greater because of the sharply increased level of military petroleum consumption which would require support from domestic petroleum resources. The 1973 Arab oil embargo offered proof, if proof were needed, of the deterioration in our national energy situation.

"Energy conservation efforts and expanded use of alternate fuels halted the growth in crude oil and product imports during much of 1974. However, production of both oil and gas in the United States continues to decline, and indications are that import growth has resumed. Projections for 1975 indicate that imports may exceed seven million barrels a day, sharply higher than in 1974 and equal to near 19 percent of the probable total energy supply in 1975. To the extent that demand for petroleum imports causes increasing reliance on insecure sources of fuel, then such demand/reliance is a severe threat to our security."

Although oil exporters vary in their specific national goals and from time to time make unilateral decisions in regard to oil policies, oil exporters have the potential to bring about concerted actions which can explicitly deny the U.S. needed imports through such actions as last year's embargo. The loss in GNP growth and the significant unemployment created have on their face a significant impact in terms of the overall strength of the national economy. Continued reliance on foreign sources of supply leaves the U.S. economy vulnerable to further disruptive, abrupt curtailment or embargo of supplies, as well as to further increases in prices. Consequently, it is only prudent from a national security standpoint to plan for the possibility that another embargo, or other type of supply interruption, could occur.

VII. *THE EXCESSIVE RELIANCE ON IMPORTED OIL AS A SOURCE OF WEAKNESS IN A FLEXIBLE FOREIGN POLICY*

The dependence of the United States on imported petroleum can also adversely affect the ability to achieve our foreign policy objectives.

A healthy and vital domestic economy coupled with modern and adequate defense forces are the basic elements of strength in protecting our national security, but equally important in today's interdependent world is the continued smooth functioning of the international economic system and, in particular, the economic strength and viability of our Allies. The economies of many of these countries are almost totally dependent on imported oil and are therefore much more vulnerable to the threat of a new oil embargo. This could adversely affect the extent to which we can rely on those Allies in the event of a serious political or military threat to this country.

The risk to our Allies and to ourselves comes not only from the possibility of disruptions of supply and the impact this could have on foreign policies but also from the effect on their domestic economies of the high cost of oil imports. Individual consumer states faced with balance of trade deficits and having difficulties in financing them, could attempt to equilibrate their trade balances through "beggar-thy-neighbor" actions.

For example, deliberate measures could be taken to interfere with markets so as to increase exports and/or decrease imports from non-oil exporting countries. Specific examples would include export subsidies, import tariffs, quotas, and perhaps other non-tariff barriers to trade. Such action would, of course, be infeasible as a concerted policy by all deficit nations and therefore irrational. Indeed, should all embark on such a course, a severe economic loss would result through income reductions to all. Exports would be reduced for all oil importing countries with loss in economic activity.

A slowdown in economic growth and consequent unemployment resulting from such a course could have

economic and social effects that could have serious political implications for our own security.

These potential problems could arise from the continued high levels of oil imports in conjunction with the price of oil, which generate large current account surpluses for OPEC. Given the limited absorptive capacity of some of these countries the increased oil revenues to these countries will not be immediately translated into increased imports. A recent estimate of the OPEC 1974 current account imbalance is about $60 billion. In contrast, the 1973 OPEC current account balance was only $13 billion. Projections of these balances through time indicate continued reserve accumulations at least until 1980, as some OPEC members will only gradually adjust their import levels to higher export revenues. An estimate of these accumulations as of 1980 is on the order of $200 to 300 billion (in terms of 1974 purchasing power) for OPEC as a group. Such a massive transfer of wealth would enhance the economic and political power of oil rich states which do not necessarily share our foreign policy objectives.

It is our expectation that these funds will be held and invested in a responsible manner. There is every economic incentive for the owners of these resources to take this course. The United States' basic economic position strongly favors maximum freedom for capital movements and we believe there is no reason to change this policy.

However, in view of the possible problems noted above, it is imperative that we join with our Allies in a concerted program of conservation, reduced reliance on imported sources of oil and development of alternative energy supplies. In this way we promote market forces that will work against further rises in already monopolistic oil prices, and exert some downward pressure on world oil prices.

The Department of Defense confirms these conclusions:

> "The appropriate restriction of oil imports will also impact favorably on the balance of payments

> and, more importantly, will permit the United States to make a significant contribution to international efforts to reduce total world oil demand which, through its recent rapid growth, has contributed to harmful increases in world oil prices. Those increases have posed serious threats to the economic and military viability of NATO and other friendly nations, as well as to the United States. Reduced dependence on imported oil can also minimize the adverse impact on the United States, NATO and other friendly nations of boycotts such as that imposed by the Arab nations in 1973."

The Federal Energy Administration has pointed out that reduction of reliance on imported oil and conservation are essential to U.S. participation in the International Energy Program. Administrator Zarb states:

> "Given the inability to create effective emergency supplies in the short run, it is important that the U.S. actively support and participate in international security agreements such as the International Energy Program (IEP), or a producer-consumer conference, with the objective of establishing future world oil prices acceptable to the U.S., the other importers, and the OPEC countries; and to decrease the likelihood of politically or economically motivated supply disruptions.
>
> "The IEP particularly is an important component of the U.S. energy supply security program. It would coordinate the responses of most major oil importing nations to international supply disruptions, provide guidelines for conservation and stockpile release programs, and avoid competition for available supplies, and thus limit the oil price increases likely to result from an oil shortage.
>
> "The IEP deters the imposition of oil export embargoes because it diminishes the ability of oil exporters to target oil shortfalls on particular oil importers, or greatly increases the cost of doing so. For example, under an IEP, a U.S. import shortfall of 3 MM B/D would require a much larger

export cutoff, and increase the political and economic costs exporters would incur in imposing an embargo.

"These measures do not exhaust the options available to the U.S. Government. They seem to us, however, to be among the most effective programs which the U.S. can implement at this time, given the character of the international energy market. As such, these options offer attractive prospects for minimizing the threat to our national security resulting from our need to continue to rely on imported oil."

VIII. *FINDINGS AND RECOMMENDATIONS*

As a result of my investigation, I recommend that the following determinations and recommendations be made by the Secretary of the Treasury and forwarded to the President:

FINDINGS

As a result of the investigation initiated by me, I have found that crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar are being imported into the United States in such quantities as to threaten to impair the national security. I further find that the foregoing products are being imported into the United States under such circumstances as to threaten to impair the national security.

RECOMMENDATIONS

I therefore recommend that appropriate action be taken to reduce imports of crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar into the United States, to promote a lessened reliance upon such products, to reduce the payments outflow and to create incentives for the use of alternative sources of energy to such imports. I understand that a Presidential Proclamation pursuant to Section 232 of the Trade Expansion Act of 1962 is

being drafted by the Federal Energy Administration consistent with these recommendations.

/s/ David R. Macdonald
DAVID R. MACDONALD
Assistant Secretary
(Enforcement, Operations, and
Tariff Affairs)

THE SECRETARY OF THE TREASURY
Washington 20220

Jan. 4, 1975

MEMORANDUM FOR ASSISTANT
SECRETARY MACDONALD

SUBJECT: Request for Section 232 Investigation

Pursuant to my authority under Section 232 of the Trade Expansion Act, 76 Stat. 877 (19 U.S.C. 1862), I am requesting you to conduct an investigation under that section to determine the effects on the national security of imports of petroleum and petroleum products.

In my judgment, national security interests require that the procedures requiring public notice and opportunity for public comment or hearings, set forth in the Treasury regulations at 31 CFR Part 9, not be followed in this case. I further find that it would be inappropriate to hold public hearings, or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation as provided by Section 232, as amended by the Trade Act of 1974. Therefore, I request that you proceed immediately with the investigation without doing so.

/s/ William E. Simon
WILLIAM E. SIMON

THE SECRETARY OF STATE
Washington

January 11, 1975

The Honorable William E. Simon,
Secretary of the Treasury.

Dear Bill:

I am responding to your January 3 memorandum and that of David Macdonald requesting the view of the State Department as to the effect of petroleum imports on our national security.

The 1973-1974 oil embargo and production cutbacks demonstrated our vulnerability and that of other industrial nations to an interruption in foreign oil supplies. In addition to its direct economic cost in lost GNP and increased unemployment, the embargo stimulated massive and abrupt price increases which the producers have been able to maintain and increase. Without preventative action, OPEC's accummulation of financial assets will accelerate, reaching a total of about $400 billion in investable funds by the end of 1980. This massive transfer of wealth will greatly enhance the economic and political power of the oil rich states who do not share our foreign policy objectives. It will also cause a serious erosion of the political power of the United States and its allies relative to the Soviet Union and China.

Clearly, decisive action is essential. We have signalled our intention to move toward energy self-sufficiency. We must now demonstrate with action the strength of our commitment. In the short-term, our only viable economic policy option is an effective program of energy conservation. A vigorous United States lead on conservation will encourage similar action by other consuming nations. Consumer cooperation on conservation now and the development of new supplies over time will deter producer aggressiveness by demonstrating that consumers are capable of acting together to defend their interests.

From the national perspective, a major United States' conservation effort will:

—reduce OPEC's financial claim on United States rerources and the transfer of economic and political power to the producers;
—reduce our vulnerability to supply disruptions;
—limit the effect of future OPEC price rises on United States growth and inflation; and
—exert some downward pressure on world oil prices.

We believe substantially higher import license fees will contribute to our conservation strategy. They should reduce our dependence on imported energy and demonstrate to other consumers and producers the seriousness of our commitment not to remain vulnerable to escalating oil prices and threats of supply interruptions.

Warm regards,

/s/ Henry A. Kissinger
HENRY A. KISSINGER

ASSISTANT SECRETARY OF DEFENSE
Washington, D.C. 20301

Jan. 9, 1975

Installations and Logistics

MEMORANDUM FOR The Assistant Secretary of the Treasury

(Enforcement, Operations, and Tariff Affairs)

SUBJECT: Section 232 Investigation on Petroleum Imports

Reference is made to your memorandum of 4 January 1975 in which you advised that the Department of the Treasury is conducting an investigation under Section 232, 76 Stat. 877 (19 U.S.C 1862), to determine the effects on the national security of imports of petroleum and petroleum products. Department of Defense views on the security implications of current and projected oil import levels were solicited.

The Department of Defense holds that this nation must have the capability to meet the essential energy requirements of its military forces and of its civil economy from secure sources not subject to military, economic or political interdiction. While it may be that complete national energy self-sufficiency is unnecessary, the degree of our sufficiency must be such that any potential supply denial will be sustainable for an extended period without degradation of military readiness or operations, and without significant impact on industrial output or the welfare of the populace. This is true because the national security is threatened when: (1) the national economy is depressed; (2) we are obliged to rely on non-secure sources for essential quantities of fuel; (3) costs for essential fuels are unduly high; and (4) we reach a point where secure available internal fuel resources are exhausted.

As you know, the Mandatory Oil Import Program was established in 1959 for the express purpose of controlling the quantity of imported oil which at that time had been

found to threaten to impair the national security. In the intervening years we have observed with growing concern the decline in domestic and western hemisphere petroleum productive capacity in relation to demand. The result has been a rapid expansion in our dependence on eastern hemisphere sources for the oil which is so essential to our military needs and the nation's economy. By 1973 that dependence had reached a level which risked substantial harm to the national economy in event of a peacetime supply denial. In event of general war, those risks would be substantially greater because of the sharply increased level of military petroleum consumption which would require support from domestic petroleum resources. The 1973 Arab oil embargo offered proof, if proof were needed, of the deterioration in our national energy situation.

Energy conservation efforts and expanded use of alternate fuels halted the growth in crude oil and product imports during much of 1974. However, production of both oil and gas in the United States continues to decline, and indications are that import growth has resumed. Projections for 1975 indicate that imports may exceed seven million barrels a day, sharply higher than in 1974 and equal to near 19 percent of the probable total energy supply in 1975. To the extent that demand for petroleum imports causes increasing reliance on insecure sources of fuel, then such demand/reliance is a severe threat to our security. Given the gradual reduction in the quantity of petroleum available from relatively secure Western hemisphere sources, relative dependence on insecure sources in the eastern hemisphere will grow more rapidly than the overall growth in oil imports.

The exhaustion of our available internal fuel resources would pose an even greater threat to our security. Therefore, our petroleum policy should properly balance these opposing needs. That is to say, national security considerations would seem to require a proper balance of import restrictions with a decrease in demand. We recognize that the nation faces a period of several years during which dependence on insecure imported oil will

exceed levels which we would consider acceptable from a national security viewpoint. Accordingly, we believe that every reasonable effort should be made to inhibit demand growth, and increase total internal energy supply while keeping the quantity of imports at the lowest level commensurate with the essential needs of national security and the civil economy.

The proper control of petroleum imports at minimum essential levels will provide assurance to those engaged in the development of conventional and non-conventional domestic energy resources that foreign oil, regardless of its availability and potential price competitiveness, will not be allowed to deny future markets to secure domestic energy supplies. The appropriate restriction of oil imports will also impact favorably on the balance of payments and, more importantly, will permit the United States to make a significant contribution to international efforts to reduce total world oil demand which, through its recent rapid growth, has contributed to harmful increases in world oil prices. Those increases have posed serious threats to the economic and military viability of NATO and other friendly nations, as well as to the United States. Reduced dependence on imported oil can also minimize the adverse impact on the United States, NATO and other friendly nations of boycotts such as that imposed by the Arab nations in 1973.

It is our conclusion that current and projected levels of demand and need for imported petroleum products and crude oil pose substantial risks to the national security of the United States. Additional growth in the need to import will result in further dependence on eastern hemisphere sources from which oil must move over long and vulnerable sea lanes. Moreover, it will depend predominantly on nations which have demonstrated the will and ability to employ their oil resources for political purposes. Further, the rapid growth in U.S. oil imports since 1970 has had, and will continue to have if it persists, a major role in creating and maintaining the conditions which led to the oil price rises of 1973 and 1974, and impaired the ability of our NATO

allies to obtain their minimal oil needs in periods of supply disruption. Future growth will exacerbate those conditions. Increasing dependence on imported oil is inimical to the interests of the United States and should be subject to such controls as may be needed to insure that oil imports are properly balanced against our essential needs and reflect our development of additional energy resources.

Attached for your information are estimates of military petroleum requirements.

/s/ Arthur I. Mendolia
ARTHUR I. MENDOLIA
Assistant Secretary of
Defense
(Installations & Logistics)

Attachment

MILITARY PETROLEUM REQUIREMENTS

Estimated consumption, U.S. forces, FY 1975—558,000 barrels per day [1]

Estimated consumption in general war—1,800,000 barrels per day

In addition to purely military requirements there is a substantial additional need for direct and indirect use of petroleum by defense-related private industry. No data is available on the amount of petroleum involved, but broad estimates of total energy consumption by defense industry indicate that from 1.5 to 3.0 percent of total national energy consumption is currently required. That percentage would increase substantially in a protracted general war, probably largely due to conversion of industry to war production, without necessarily reflecting sharply increased energy requirements on a btu basis.

[1] Currently approximately 35% of consumption is obtained from foreign sources. No significant changes in consumption are projected through FY 1976.

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Jan. 8, 1975

In Reply Refer To:

EBM:AD/MMSDA-MS-DFF

Honorable David R. Macdonald
Assistant Secretary
Enforcement, Operations and Tariff Affairs
Department of the Treasury
Washington, D.C. 20220

Dear Mr. Macdonald:

In response to your memorandum of January 4, 1975, relating to the request for investigation on petroleum imports under Section 232 of the Trade Expansion Act, we have enclosed some observations concerning the effects on the national security of imports of petroleum and petroleum products.

Sincerely yours,

/s/ Jack W. Carlson
JACK W. CARLSON
Assistant Secretary of
the Interior

Enclosure

THE EFFECTS ON NATIONAL SECURITY ON IMPORTS OF PETROLEUM AND PETROLEUM PRODUCTS

Imports of crude oil in the first nine months of 1974 averaged 3.3 million barrels per day, and imports of petroleum products and unfinished oils in petroleum averaged 2.6 million barrels per day. Total imports as a percent of supply accounted for 36 percent and demand for petroleum products in the same period averaged nearly 16.5 million barrels per day. In the first nine months of 1974, residual fuel oil accounted for 60.2 percent of our product imports and 61.3 percent of domestic residual fuel oil demand; distillate fuel oil, 9.3 percent of imports, and 8.6 percent of demand. Imports of gasoline constituted 8.4 percent of products, but only 3.4 percent of domestic demand; jet fuel, 6.3 percent of imports and 16.7 percent of demand. Imports of liquefied gases and ethane comprised 4.6 percent of products and 9 percent of demand. Other products, which includes naphthas, kerosene, lubricants, waxes, asphalt, etc., aggregated 11.2 percent of product imports and 13.7 percent of domestic demand.

If crude oil imports were cut off, refining operations in the U.S. would have to be curtailed sharply. Based on average refinery yields (August 1974), domestic refineries obtained from the 3.3 million barrels a day of crude oil imported, nearly 1.6 million barrels a day of gasoline, nearly 700 thousand barrels a day of distillate fuel oil, and 274 thousand barrels a day of residual fuel oil.

Viewed narrowly, namely in terms of the probable needs of the Department of the Defense under present conditions or in a major nuclear war, it would appear that petroleum importations at current levels would not jeopardize national defense per se. However, a cut off of foreign supplies of crude petroleum and/or petroleum products would have a serious impact on the national economy, such as was demonstrated in the 1973-74 Arab Oil Embargo. Broadly viewed, a disruption of imports could have serious implications for the national

security, as well, in that a strong and healthy economy is generally considered essential to our overall ability to maintain our free democratic institutions.

Still another consideration is the adverse impact petroleum products imports have on expansion of domestic refinery capacity. We cannot now meet our normal doemstic needs from the full output of existing refinery capacity. An increase in imports of products would be harmful to national security because increasing dependence on such sources would not only make the United States more vulnerable to disruptions in supply flows, but also inhibit domestic refinery expansion.

Even without a further embargo, large imports pose an economic threat. The accompanying chart includes a 1974 estimated value of products and crude oil imports totaling $23.5 billion. Furthermore, in view of recent OPEC announcements, expenditures for petroleum imports could be even greater in 1975, and subsequent years. Therefore, this capital drain could have serious repercussions on the U.S. economy, and endanger the national security thereby. Moreover, large capital exports to nations not necessarily friendly to the objectives of the United States increases the potential for harm to ourselves or to our allies, and thus increases the threat to our security.

THE SECRETARY OF COMMERCE

Washington, D.C. 20230

Jan. 10, 1975

MEMORANDUM FOR THE
SECRETARY OF THE TREASURY

SUBJECT: Section 232 Investigation of Petroleum Imports

This is in response to your memorandum of January 4, 1975, concerning the investigation of oil imports being initiated under Section 232 of the Trade Expansion Act of 1962, as amended. Specifically, your memorandum forwarded the request of Assistant Secretary of the Treasury Macdonald for (a) any information this Department has bearing on the effects on the national security of imports of petroleum and petroleum products, and (b) advice as to whether petroleum and petroleum products are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

Based on prior analyses and a brief review during the past five days, it is my opinion that there is no question that imports of petroleum at current volumes and circumstances, including the current level of OPEC prices, threaten to impair the national security. Under these circumstances, we recognize the threat posed by oil imports to the ability of the United States to produce goods and services essential for ensuring our national security preparedness. We recognize the additional threat posed by the possibility of an extended embargo of oil imports. Section 232 of the Trade Expansion Act, the basis for the present investigation, in fact requires that recognition be given to "the close relation of the economic welfare of the Nation to our national security."

As you know, the quota system of the Mandatory Oil Import Program, based on national security findings, was in effect from 1959 to early 1973. Its objective was to restrict imports of petroleum and petroleum products

to 12.2 percent of domestic production in Districts I-IV (the Eastern 80 percent of the continental U.S.) and to no more than the difference between demand and domestic supply in District V (the West Coast). At that time, foreign oil was priced well below domestic oil and restrictions on imports were judged necessary to preserve a viable domestic crude oil producing industry. However, in recent years domestic consumption has increased much faster than production, and it has not been feasible to maintain the old formula. In early 1973, import quotas were replaced by the license fee program, and imports of crude petroleum and products by the end of 1974 reached a figure which amounted to slightly more than 35 percent of consumption. I am enclosing a publication from the Bureau of the Census in which import quantities for 1973 and 11 months of 1974 are given.

The experience of the Arab oil embargo last year, even though it halted only about one-half of our oil imports, confirms the risk of disruption to the economy which is implicit in dependence on imports of oil to this degree. The oil embargo is believed to have produced a reduction in U.S. GNP by some $10 to $20 billion. All sectors of the economy were adversely affected, with the consumer durables sector and housing construction most heavily hit. Further, it is estimated that a substantial part of the inflationary rise of prices during 1974, particularly in the first half, is attributable to the direct and indirect effects of the rise in overall energy costs which followed the rapid escalation of costs for Arab oil. In view of this record of injury caused by loss of foreign oil supply and our continuing vulnerability to future injury of even greater impact, it is my opinion that imports at current and projected levels do constitute a threat to impair the national security.

In summary, I perceive the threat as being based on two factors: the possibility of an extended embargo and the inflationary impact of higher prices and volumes. We certainly want to ensure, should a positive finding be determined, that any recommended course of action

would address these factors. If I can be of any further assistance in your deliberations, please let me know.

[Illegible]
Secretary of Commerce

Enclosure

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
Washington

Jan. 9, 1975

MEMORANDUM TO DAVID R. MACDONALD,
ASSISTANT SECRETARY
(ENFORCEMENT, OPERATIONS,
AND TARIFF AFFAIRS)

SUBJECT: Section 232 Investigation on Petroleum Imports

REFERENCES: Memorandum, January 4, 1975, above subject from Secretary of the Treasury, William E. Simon.

Memorandum, January 6, 1975, above subject, Assistant Secretary of the Treasury, David R. MacDonald.

The Department of Labor currently has no information available directly relating to whether petroleum or petroleum products are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

Data usually provided by the Department of Labor for Section 232 investigations could not be collected and made available within the time required by Mr. Simon's memorandum of January 4. If you wish us to proceed with the fully detailed Department of Labor portion of a Section 232 investigation, we would be pleased to consult with you on the matter.

As noted in the memorandum of January 4, some work has been done in the Department concerning the current effects of imports of petroleum and petroleum products, albeit not in relationship directly to national security. This work includes:

1. The *Secretary of Labor's Report on the Impact of Energy Shortages on Manpower Needs*, dated March 1974. This report, required under Section 506 of the Comprehensive Employment and Training Act of 1973, deals with the impact of energy shortages on current and future employment. A copy is enclosed.
2. *Labor Report*, a part of the *Project Independence Blueprint Task Force Report*, dated November 1974. This report is available from the Federal Energy Administration.
3. "The Effects of Oil Resource Allocation", an unpublished study recently completed by Professor Yoram Barzel of the University of Washington under contract to the Department of Labor. The study is currently being reviewed within the Department. If it appears that this study contains material relevant to the effect of petroleum and petroleum products imports on national security we will advise you.

/s/ Joel Segall
JOEL SEGALL
Deputy Under Secretary
International Affairs

Enclosure

THE CHAIRMAN OF THE
COUNCIL OF ECONOMICS ADVISERS

Washington

January 8, 1975

Dear Mr. Macdonald:

Petroleum and petroleum products are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security.

The quantity of imports of petroleum and petroleum products is so large that these imports are essential to the continued functioning of our economy at acceptable levels of employment and output. Unless appropriate action is taken, petroleum and petroleum product imports would continue at current or higher levels, leaving the economy open to serious damage if those imports were interrupted.

The circumstances under which petroleum and petroleum products are being imported into the United States lead to a threat to national security. Foreign governments may interrupt the flow of petroleum and petroleum product imports to the United States to achieve economic or political ends. Oil-exporting nations whose exports are now essential to the continued security of the United States have agreed to act jointly in matters of oil exports. Collective action by some petroleum exporters reduced U.S. petroleum imports during 1973-1974 with serious damage to the economy and security of the United States. A threat to our national security will exist until the United States can absorb the effects of an embargo without damage to its vital economic and military interests.

The United States can absorb the effects of an embargo without serious damage only if imports from those countries which act jointly on petroleum matters are not essential to the United States. These imports would not be essential if the economy of the United States required only as much petroleum and petroleum products, or their substitutes, as could be produced within our

borders or imported from nations which did not belong to the group which acted jointly on petroleum matters. Consequently, actions which cause the economy to adjust to the consumption of less energy in the form of petroleum and petroleum products, and/or which cause more petroleum products to be supplied by domestic sources, would lead to greater national security.

Alternatively, imports from those nations which act jointly on petroleum matters would not threaten the security of the United States if alternative sources of petroleum and petroleum product supply could easily and readily replace interrupted imports. At present such supplies do not exist, and consequently there is a threat to the national security of the United States.

In summary, petroleum and petroleum products are now being imported in quantities such that serious damage to national security would result from interruption of these imports. The circumstances under which petroleum and petroleum products are being imported makes those imports insecure. Consequently, petroleum and petroleum product imports threaten the national security.

Sincerely,

/s/ Alan Greenspan
Alan Greenspan

Honorable David R. Macdonald
Assistant Secretary (Enforcement, Operations,
and Tariff Affairs
Department of the Treasury
Washington, D.C. 20220

FEDERAL ENERGY ADMINISTRATION
WASHINGTON, D. C. 20461

JAN. 11, 1975

Office of the Administrator

David R. Macdonald
Assistant Secretary
Enforcement, Operations, and
Tariff Affairs
U.S. Department of the Treasury
Washington, D. C. 20220

Dear Mr. Macdonald:

This is in response to your memorandum of January 4, 1975, concerning Treasury Department Section 232 Investigation on Petroleum Imports.

The Project Independence Report projected continued U.S. reliance on imported oil through 1980, given projected U.S. domestic supply/demand responses to world oil prices of $4-$11 per barrel.

It is our judgment that, whatever its source, imported oil is inherently less secure than domestic oil. Oil import shortfalls jeopardize the national security of the U.S. and other oil dependent nations because they impose severe economic costs. For that reason, the costs of offsetting that insecurity ought to be reflected explicitly in the domestic price of imported oil.

The future supply security of U.S. imports was a major focal point in the Project Independence Report. The International Assessment of that report assessed U.S. vulnerability to foreign political and economic coercion resulting from disruptions in the supply of imported crude. It should be noted, moreover, that a significant disruption in imports of certain finished products, such as residual fuel oil, could have major economic security implications for the country. For example, approximately 80 percent of residual fuel oil consumed in the U.S. is imported and

most of it is consumed on the East Coast for the production of electricity and for industrial use. At the present time, very few of these users have the capability of converting to other fuels in the event of a temporary supply disruption lasting several months or longer.

The report evaluates a number of alternatives for offsetting the costs of oil import interruptions. The criteria for evaluating these options included their relative contribution to U.S. energy import supply security, their costs, and their impact on world oil prices. The most prominent options are: 1) Regulation of energy consumption during an oil import shortfall; 2) Alternative domestic emergency energy supplies; 3) International oil sharing. Each of these is discussed in greater detail below.

1. *Regulation of energy consumption*:

As was demonstrated during the 1973-74 embargo, government regulation of domestic fuel supplies can diminish the economic impact of an oil import embargo. FEA has estimated that an oil shortfall of approximately 1 million barrels/day can be managed by fuel allocation programs, without imposing prohibitive costs on the economy. In the short-term, 1975-76, this option is likely to remain effective. In the longer term, more efficient energy utilization will diminish the extent to which oil import shortfalls can be managed exclusively by relying on minimal cost fuel allocation programs.

2. *Alternative emergency energy supplies*:

In the short-term, 1975-76, emergency energy supply availability is limited to current inventories, domestic and international stocks, and any available production capacity of exporting states not participating in the embargo.

In the longer term, strategic petroleum reserves could be developed. For example, our assessment of current oil import security indicates the desirability of 1 billion barrels of crude oil, stored in U.S. salt-dome caverns as they become available. The amount could be adjusted as the threat assessment changes. Such a stockpile could

offset a 3 MM barrel/day import cut for nearly one year. Given domestic conservation programs and alternate supply sources, however, the stockpile would most likely last longer than one year.

It will take several years to build strategic reserves to the desired level. In the meantime, the U.S. must consider ways to dampen the rate of increase in oil imports. We feel that, even at current world oil prices, the *cost* of using imported oil, i.e., the expected economic loss caused by an import shortfall, and/or the costs of emergency supply programs to diminish that loss, is currently not internalized by the U.S. economy. To this end, FEA feels a "security fee" on imported oil would be effective. This fee ($1 to $3 per barrel) could be used in part to finance the strategic reserve programs, and to encourage development of domestic energy resources.

3. *International energy agreements*:

Given the inability to create effective emergency supplies in the short run, it is important that the U.S. actively support and participate in international security agreements such as the International Energy Program (IEP), or a producer-consumer conference, with the objective of establishing future world oil prices acceptable to the U.S., the other importers, and the OPEC countries; and to decrease the likelihood of politically or economically motivated supply disruptions.

The IEP particularly is an important component of the U.S. energy supply security program. It would coordinate the responses of most major oil importing nations to international supply disruptions, provide guidelines for conservation and stockpile release programs, and avoid competition for available supplies, and thus limit the oil price increases likely to result from an oil shortage.

The IEP deters the imposition of oil export embargoes because it diminishes the ability of oil exporters to target oil shortfalls on particular oil importers, or greatly increases the cost of doing so. For example, under an IEP, a U.S. import shortfall of 3 MM B/D would require a

much larger export cutoff, and increase the political and economic costs exporters would incur in imposing an embargo.

These measures do not exhaust the options available to the U.S. Government. They seem to us, however, to be among the most effective programs which the U.S. can implement at this time, given the character of the international energy market. As such, these options offer attractive prospects for minimizing the threat to our national security resulting from our need to continue to rely on imported oil.

We have enclosed a copy of the International Assessment chapter from the Project Independence Report together with a copy of the PIMS "U.S.-OPEC Petroleum Report," which provides OPEC export volume and pricing data for 1973 by individual member countries. The 1974 report has not yet been compiled.

We trust that this information will be helpful in the conduct of your investigation.

Sincerely,

/s/ Frank G. Zarb
FRANK G. ZARB
Administrator

Attachments
a/s

cc: William E. Simon
Secretary of the Treasury

ANNEX C

CRUDE PETROLEUM AND PETROLEUM PRODUCTS [1]

1974 Data in 1,000 bbl/day

Month	Domestic Production	Crude Imports	Product Imports	Total Imports	Domestic Demand
January	8,907	2,382	2,973	5,455	17,270
February	9,156	2,248	2,973	5,271	17,371
March	8,950	2,462	2,753	5,215	16,045
April	8,952	3,267	2,703	5,970	15,919
May	8,903	3,748	2,454	6,202	15,624
June	8,777	3,957	2,218	6,175	16,459
July	8,893	4,167	2,143	6,310	16,156
August	8,918	3,905	2,286	6,190	16,332
Eight Month Average	8,932	3,267	2,563	5,830	16,397

Imports as percent of demand—35.6%

LATEST DATA [2]

Four Weeks (Ending Dec. 13)	8,661	4,047	3,360	7,407	18,742

Imports as percent of demand—39.5%

[1] FEA, Monthly Energy Review—Oct. 1974

[2] FEA, Petroleum Situation Report—Dec. 13, 1974

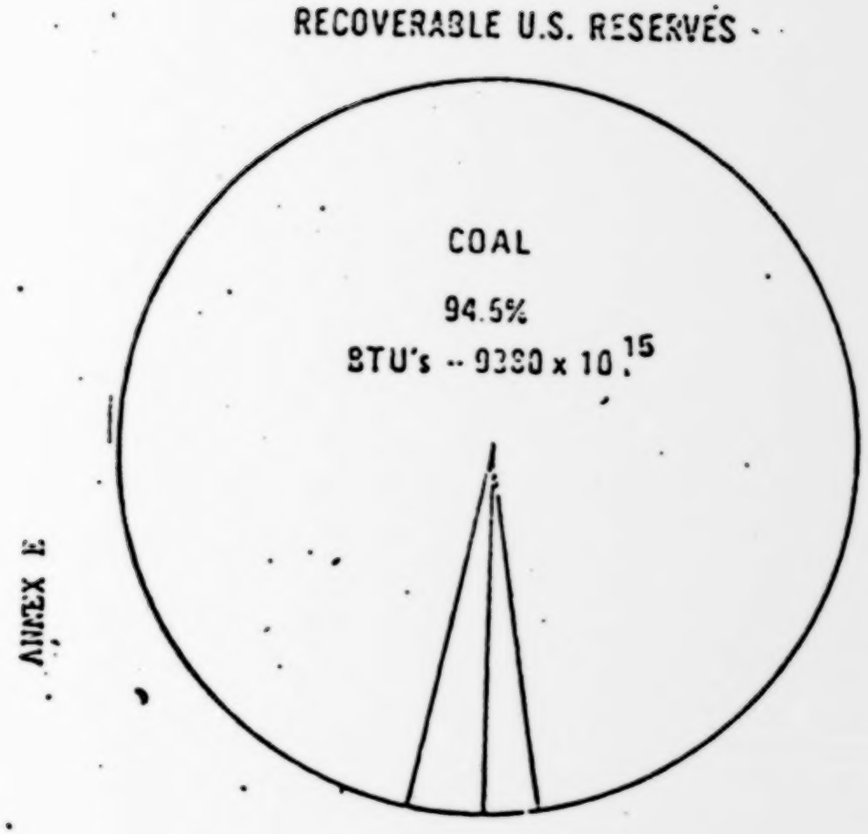
ANNEX D

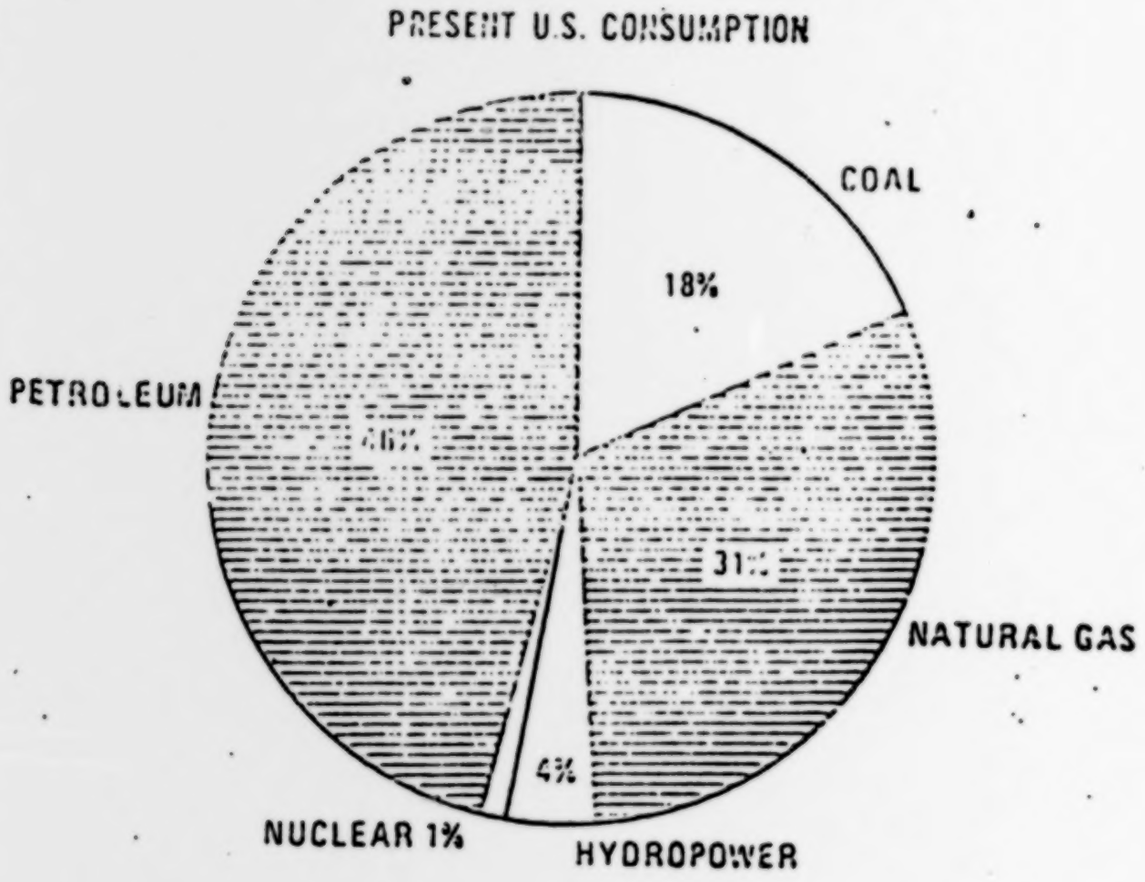
U.S. IMPORTS OF CRUDE OIL AND PETROLEUM PRODUCTS BY SOURCE JANUARY THRU OCTOBER 1974 IN 1000 BBLS/DAY

Country	Total
Algeria	220
Egypt	14
Kuwait	2
Qatar	16
Saudi Arabia	382
United Arab Emirates	82
Major Arab OPEC Countries	716
Ecuador	71
Indonesia	296
Iran	542
Nigeria	670
Venezuela	1,131
Gabon	33
Major OPEC Countries	3,459
Canada	1,015
Netherland Antilles	494
Angola	50
Italy	100
Netherlands	52
Mexico	10
Bahamas	213
Trinidad	272
Others	178
Grand Total	5,843

Source: Federal Energy Administration from Census Bureau FT-135 Report.

THE CRUX OF U.S. PROBLEM





Source: FEA - Project Independence P-13

ANNEX E

ANNEX F

U.S. Crude Oil Daily Averages in 1,000 bbls per day Production

Date	Quantity*
1964	7,614
1965	7,804
1966	8,295
1967	8,810
1968	9,095
1969	9,238
1970	9,637
1971	9,462
1972	9,441
1973	9,187
4 weeks ending Dec. 13	8,661**

Sources: * API Annual Statistical Review (BuMines) Sept. 1974, page 13.

** FEA Petroleum Situation Report Dec. 13, 1974.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

JAN. 14, 1975

Honorable William E. Simon
Secretary of the Treasury
Washington, D. C. 20220

Dear Mr. Secretary:

This is in response to your letter of January 7, 1975 requesting my views as to compliance with § 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, and with applicable Treasury regulations, of the proposed procedures for adoption and the proposed contents of an amendment to Proclamation 3279, Adjusting Imports of Petroleum and Petroleum Products into the United States, 3 CFR Proc. 3279, as amended.

Proclamation 3279 was originally promulgated on March 10, 1959 (24 Fed. Reg. 1781), after a finding by the Director of the Office of Civil and Defense Mobilization pursuant to 19 U.S.C. § 1352a (Pub. L. No. 85-686, § 8(a), Aug. 20, 1958, 72 Stat. 678) "that crude oil and the principal crude oil derivatives and products are being imported in such quantities and under such circumstances as to threaten to impair the national security," which finding was concurred in by the President. As you are aware, that finding was based upon the facts that existed at that time, an overproduction of petroleum in the world market with a consequent extremely low price for foreign petroleum which discouraged domestic exploration and production. No one doubts that the finding was accurate, and a proper basis for the Proclamation, in 1959,[1] but the question arises whether it is a lawful basis for the presently contemplated modification of the restrictions, especially in light of the drastic change from the factual situation which provided the basis of the 1959 finding.

[1] In *Texas Am. Asphalt Corp.* v. *Walker*, 177 F. Supp. 315 (S.D. Tex. 1959), the President's judgment that the facts called for exercise of his authority was held not subject to judicial review.

Today the world is faced with high prices and threatened cutbacks in production, and the United States has recently suffered an oil embargo by many producing states.

Section 232(b) of the Trade Expansion Act, as amended, 19 U.S.C. § 1862(b), after setting forth the requirement for an investigation and finding of a threat to the national security, provides that the President

> . . . shall take such action, *and for such time, as he deems necessary* to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security. (Emphasis supplied.)

The normal meaning of the phrase "such action," in a context such as this, is not a single act but rather a continuing course of action, with respect to which the initial investigation and finding would satisfy the statutory requirement. This interpretation is amply supported by the legislative history of the provision, which clearly contemplates a continuing process of monitoring and modifying the import restrictions, as their limitations become apparent and their effects change. See *e.g.*, the comments on the floor of the House by Congressman Cooper, floor manager of the bill which adopted the provision:[2]

> The President would not only retain flexibility as to the particular measure which he deems appropriate

[2] 19 U.S.C. § 1862(b) has its origin in Section 7 of the Trade Agreements Extension Act of 1955, 69 Stat. 166. It was originally codified to 19 U.S.C. § 1352a. In the Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 8(a) Aug. 20, 1958, 72 Stat. 678, the wording of the subsection was slightly changed so as to increase the President's flexibility and power, *see* S. Rep. No. 1838, 85th Cong., 2d Sess., 1958 U.S. Code Congressional and Administrative News 3614, and a new subsection was added which is now 19 U.S.C. § 1862(c). In 1962 the entire section was reenacted as § 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, Oct. 11, 1962, 76 Stat. 877, and codified to 19 U.S.C. § 1862, without change in meaning or intent, *see* S. Rep. No. 2059, 87th Cong., 2d Sess., 1962 U.S. Code Congressional and Administrative News 3118. Most recently the Trade Act of 1974, Pub. L. No. 93-618, § 127(d), made further slight amendments in the investigation procedure.

> to take, but, having taken an action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made.[3]

The Conference Report on the bill stated with reference to § 232(b) that "it is . . . the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority. . . ." H. Rep. No. 745, 84th Cong., 1st Sess. 7 (1955). The 1958 amendments to § 232(b) were aimed at eliminating the same sort of wastefulness and duplication of effort which a requirement of reinvestigation for every modification of restrictions would produce. *See* S. Rep. No. 1838, note 2 *supra*.

The interpretation here proposed, whereby import restrictions once imposed can be modified without an additional investigation and finding, has been sanctioned by the Congress' failure to object to the President's proceeding on that basis repeatedly during the past fifteen years. Proclamation 3279 has been amended at least twenty-six times since its issuance in 1959, *see* 19 U.S.C. § 1862 note. Some of those amendments have been minor administrative changes; others have involved major alteration of the means by which petroleum imports were restricted; none have been preceded by a formal § 232(b) investigation and finding. The force of congressional acquiescence in this practice is particularly strong since Congress has, during that period, twice amended the very provision in question—the last time only a month ago. *Cf. Saxbe* v. *Bustos*, —— U.S. ——, ——, 43 USLW 4017, 4021 (Nov. 25, 1974).

The foregoing does not imply that the statute contemplates modification of restrictions without any Presidential determination that the modification is necessary to protect against imports that threaten national se-

[3] 101 Cong. Rec. 8160-61 (1955). Because these remarks were made in amplifying the Conference Report by the House floor manager, they are entitled to be given the same weight as a supplemental committee report. *See Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474-75 (1921).

curity. To the contrary, not only for modification but even for continuation of restrictions the statutory scheme presumes that the President will monitor, through the appropriate agency (now the Department of the Treasury), the factual situation and the effectiveness of his measures in meeting it. The point, however, is that this monitoring, both for continuation and for modification, does not have to comply with the formal investigation and finding requirements applicable to the original imposition of the restriction. And there is nothing to indicate that this rational scheme somehow changes when the factual basis on which a threat to the national security is found changes from that which governed the original determination. Such a distinction, not only has no foundation in the statute or its legislative history; it is also unworkable, since facts constantly change and there is no apparent criterion for determining when the change is significant enough to give rise to a reinvestigation and renewed finding requirement.

My conclusion that there is no legal requirement for a new § 232(b) investigation and finding in order to issue the proposed Proclamation does not preclude your making a specific investigation and finding if you wish to do so in connection with the constant monitoring which the statute envisions. Such discretionary action would not be subject to the requirements of § 232(b) nor to the Treasury regulations (31 CFR Part 9) relating to that section. Moreover, even if it were, there is no doubt that you would not be required to give notice, allow for public comment, or hold public hearings on the matter. Section 232(b) states that "the Secretary shall, *if it is appropriate* and after reasonable notice, hold public hearings. . . ." (Emphasis added.) There is no evidence in the report of the committee which drafted this language, S. Rep. No. 93-1298, 93d Cong., 2d Sess. 96 (1974), that it is meant to establish a standard any more specific or restrictive than its language implies. Your own regulations require public notice upon undertaking an investigation and allow for public comment, 31 CFR § 9.7(b); and they provide for public hearings when the Assistant Secretary deems it appropriate, 31

CFR § 9.7(f). But these provisions can be varied or dispensed with in emergency situations or when, in your judgment, national security interests require, 31 CFR § 9.8. Your letter states that you have determined in the present case that national security interests require a most speedy investigation which would not allow for notice and hearings or comments. This reason fully suffices for dispensation from any such requirements of the statute and the regulations.

There remains for consideration the question whether § 232(b) authorizes the types of measures adopted by the proposed Proclamation to restrict imports of petroleum and petroleum derived products. It is clear that § 232 grants the President the broadest flexibility in determining what measures to use to restrict imports, as well as in modifying the restrictions in light either of changed circumstances or of evidence that existing restrictions were insufficient. The language of the section, "take such action . . . as he deems necessary," reflects this, and the legislative history reinforces it.

The report of the Committee which drafted this provision stated that the President was to have the authority to take "*whatever* action is necessary to adjust imports." (Emphasis supplied.) S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). On the floor of the Senate, Senator Milliken, who with Senator Byrd actually drafted the provision as an amendment to the House bill, stated that:

> It grants to the President authority to take whatever action he deems necessary to adjust imports.... He may use tariffs, quotas, import taxes, or other methods of import restrictions. 101 Cong. Rec. 5299 (1954).

Senator Barkley, also a member of the Senate Finance Committee which added this section to the bill, stated that the President can

> . . . imposes such quotas or take other steps as he may believe to be desirable in order to maintain the national security. 101 Cong. Rec. 5298 (1955).

Senator Bennett, again a member of the Senate Finance Committee, commented on the powers the President could give to the Office of Defense Mobilization, saying that

> . . . they will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs. 101 Cong. Rec. 5588 (1955).

The Conference Report made clear that the President's flexibility in choosing the means extended not merely to his initial action but also to any modifications that he might make in light of changed circumstances. H. Rep. No. 745, *supra*; see the floor remarks of Congressman Cooper, quoted at page 3, *supra*. The 1958 amendments intended no change in this flexibility and discretion. The Senate Report stated:

> As was the purpose when the national security section was added in the 1955 extension of the act, the amendments are designed to give the President unquestioned authority to limit imports which threaten to impair defense-essential industries.

S. Rep. No. 1838, *supra*. A broad interpretation of the President's powers under § 232(b) has been concurred in by the courts. As stated in *Pancoastal Petroleum, Ltd.* v. *Udall*, 348 F.2d 805, 807 (D.C. Cir. 1965), "The law confers discretion on the President in broadest terms."

Against this background, there is no doubt that the devices employed in the draft Proclamation are within the authority of § 232(b). These include a return to the tariffs eliminated by Proclamation 4210 of April 18, 1973, and an increase in the license fees established by the same Proclamation. Both tariffs and license fees are traditional means of restricting imports and certainly envisioned by the statutory provision.

Sincerely,

/s/ Wm. B. Saxbe
Attorney General

AFFIDAVIT OF WASSILY LEONTIEF

I, Wassily Leontief, being duly sworn on oath depose and say:

1. My name is Wassily Leontief and I reside at 14 Ash Street, Cambridge, Massachusetts. I am presently a Professor of Economics at Harvard University and Chairman of the Society of Fellows at Harvard University. I have been a member of the Faculty of Harvard University since 1932. I am a member of the National Academy of Science. I received the Nobel Prize in Economics for the year 1973 for my development of the input/output method of economic analysis. My specialty is the study of the structure of national economies. I am the author of numerous books and articles in professional journals on economics. I have frequently acted as an advisor to the United States Government, the United Nations and various business, industrial and international organizations.

2. At the request of parties interested in the proposed litigation to test the validity of President Ford's Proclamation of January 23, 1975 dealing with the imposition of certain controls on imported petroleum products, I am signing this Affidavit.

3. There have been brought to my attention and I have read the Presidential Proclamation of January 23, 1975 and the Report of Secretary of the Treasury, William Simon to the President dated January 14, 1975, entitled "Report on Section 232 Investigation on Petroleum Imports:"

4. I have seen no systematic study on the effect of the proposed presidential action on economy of the United States as a whole. So far as I am aware, no such study has been prepared. It is possible that some study was made in connection with the letter of January 11, 1975 from FEA Administrator, Frank E. Zarb, to David R. Macdonald, Assistant Secretary of the Treasury (attached to the Simon Memorandum to the President). However, there is no supporting data in the report of the Secretary of the Treasury to the President. Similarly, I have seen no such systematic study of the regional impact of the proposed presidential action. In past instances involving matters of this gravity, I have been aware of many such systematic studies made.

5. Along with other methods of analysis which can and should be used in this instance, in my opinion it is advisable to make an input/output analysis of the problem in order to verify the results of any other studies and in order to be able to make reasonable reports, findings, and recommendations thereon.

6. The input/output analysis which I refer to is a method of economic analysis which takes into account the mutual interdependence of all sectors of the economy and traces through the economy the effects of the proposed action on petroleum products on all other industries, households, consumers, and final users, including government as a household or ultimate consumer.

7. There is no dispute that this Proclamation, if left in effect, will have a major and lasting effect on the economy of the United States as a whole and will be injurious to the standard of living of the American citizenry.

Any study of inflation and cost-of-living impact must have reference to the price indices of the Bureau of Labor Statistics of the Department of Labor. This Bureau is generally the most respected, objective and best known unit of government in this fact-finding area. The Department of Labor plays a major role in the type of study envisioned on petroleum imports. Attached to the Simon memorandum to the President is a memorandum of January 9, 1975 to the Assistant Secretary of the Treasury, David R. Macdonald, from Joel Segall, Deputy Under-Secretary of Labor. This memorandum states that "data usually provided by the Department of Labor for Section 232 investigations *could not be collected and made available* within the time required by Mr. Simon's memorandum of January 4." (Emphasis added). In my opinion, no adequate study can be made without such data.

8. An input/output analysis can be done by regions as for the Northeast States, to establish the peculiar impact on any region of the proposed action. Such a

regional analysis is similarly needed on the same premise as stated above for a national input/output analysis.

9. A fundamental aspect of any such action is its *equity*. Any study of this proposed action should address itself to the impact of the proposed governmental action on distribution of income among different groups of citizens in different regions of the country. No evidence of any such systematic study has been discerned by me in this report or the accompanying Proclamation. There is no presentation of the result of such a study.

10. The impact of the proposed government action will be most serious and greater on the Northeast States one of the most heavily populated regions of the country because of the reliance of the Northeast States and other heavily populated regions upon imported petroleum products. No concrete supporting data is presented to gauge the effectiveness of any of available compensatory and ameliorative measures.

11. I have been informed that the request from the Secretary of the Treasury for a report in this matter and investigation was dated January 4, 1975; the date on the Secretary of the Treasury's Report is January 14, 1975, some ten days later. I cannot conceive of any possibility of adequate investigation being made within that very limited time period. In my experience with investigations and studies of this nature and purpose in the past, they could not be completed in less than one to two months at minimum.

12. I note that Secretary Simon's Report makes no recommendation other than that appropriate action be taken to reduce imports of crude oil. The President's Proclamation then adopts certain methods on the assumption that the methods would result in a reduction of imports of crude oil, and that these are appropriate for so doing. There is nothing in Secretary Simon's Report or the President's Proclamation to suggest or substantiate that the methods adopted will accomplish the recommended end of reducing imports of crude oil. This assumption may be valid but should be the subject of thorough investigation and proof. Given the nature

of the market mechanism and particularly as it relates to petroleum products, the use of a price mechanism alone to achieve quantitative results is particularly unpredictable.

13. If an appropriate study, as suggested, is conducted, it should go a long way toward designing adequate means to relieve the hardship which will probably result from this plan to reduce imports of petroleum products.

/s/ Wassily Leontief
WASSILY LEONTIEF
Cambridge, Mass.
January 26, 1975

Middlesex, SS.

Then personally appeared before me the above-named Wassily Leontief who subscribed his name and made oath to the foregoing.

/s/ MARY L. ALLEN
Notary Public

My Commission expires June 20, 1980.

[Filed February 14, 1975]

COMMONWEALTH OF MASSACHUSETTS, ET AL., PLAINTIFFS

v.

WILLIAM E. SIMON, ET AL., DEFENDANTS

ALGONQUIN SNG, INC., ET AL., PLAINTIFFS

v.

WILLIAM E. SIMON, ET AL., DEFENDANTS

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants, by their undersigned attorneys, respectfully oppose the motions for preliminary injunction filed by the plaintiffs in these consolidated cases on the grounds that they have failed to make the requisite showings necessary to support the granting of a preliminary injunction:

(1) there is no likelihood of their succeeding on the merits;
(2) as to certain of the plaintiffs, there is an adequate remedy at law;
(3) there is no legally cognizable injury arising out of the challenged action; and
(4) the granting of an injunction would adversely impair the public interest.

In support of this opposition, the court is respectfully referred to the affidavits of William E. Simon, Secretary of the Treasury; Eric R. Zausnes, Assistant Administrator, FEA; Russell Petersen, Chairman, Council on Environmental Quality; and Kenneth Woodcock, Associate Assistant Administrator for Environmental

Programs; FHA; attached hereto and to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

/s/ Carla A. Hills
CARLA A. HILLS
Assistant Attorney General
Civil Division

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant Attorney General
Civil Division

/s/ Stanley D. Rose
STANLEY D. ROSE

Attorneys, Department of Justice
Attorneys for Defendants

[Caption Omitted]

AFFIDAVIT OF WILLIAM E. SIMON

I, WILLIAM E. SIMON, being duly sworn, do depose and say:

1. I am presently and have been since May 8, 1974, Secretary of the Treasury, and I am also the chief economic spokesman for the Administration of President Ford. Since joining the Administration in January, 1973, I have been deeply involved in the formulation of oil import policy in various capacities: as Chairman of the Oil Import Policy Committee, Administrator of the Federal Energy Administration, and as Secretary of the Treasury. Consequently, I am personally familiar with the effects of petroleum imports on the economy of the United States and the national security, and I have devoted a substantial part of my time to these matters.

2. As Secretary of the Treasury, I am responsible to the President and the Congress under section 232 of the Trade Expansion Act of 1962, as amended, for making an investigation to determine the effects on the national security of imports of an article if such investigation is initiated on my own motion, on request of the head of any department or agency, or upon application of any interested party. If, as the result of such investigation, I am of the opinion that the article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, I am required to promptly advise the President.

3. I delegated the authority to conduct investigations under section 232 to the Assistant Secretary for Enforcement, Operations, and Tariff Affairs (31 CFR Part 9).

4. By memorandum dated January 4, 1975, I directed Treasury Assistant Secretary Macdonald to initiate an investigation under section 232 of the Trade Expansion Act of 1962, as amended, to determine whether petroleum and petroleum products are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

5. In conducting the investigation, I sought information and advice from the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States to determine the effects on the national security of imports of petroleum and petroleum products. I also gave consideration to those matters specified in section 232(c) of the Trade Expansion Act, and to other factors, insofar as they were deemed to be relevant.

6. Assistant Secretary Macdonald reported his findings and recommendations concerning his investigation of petroleum imports on January 13, 1975.

7. I kept President Ford abreast of the progress of the investigation, and based on Assistant Secretary Macdonald's report, the factual data resulting from his investigation, the advice received from the Departments and agencies consulted in accordance with the statute, and my experience as Administrator of the Federal Energy Administration and as Secretary of the Treasury, I orally reported to the President on January 13, 1975, my finding that crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security. Accordingly, as provided by section 232, I recommended to the President that he take action to adjust imports of these products. This verbal report was followed by a written report dated January 14, 1975.

8. I was advised by the General Counsel of the Department of Treasury that section 232, as amended by the recently enacted Trade Act of 1974, authorized me to determine whether or not it would be appropriate to conduct the investigation without holding public hearings or otherwise affording interested parties an opportunity to present information and advice relevant to the investigation. I was also advised that the Treasury Department regulations implementing section 232 authorize me to vary or dispense with the procedures in the regulations providing for public notice and opportunity for public comment in the conduct of the investigation when, in my judgment, national security interests require it.

9. In my memorandum of January 4, 1975, to Assistant Secretary Macdonald, I determined that it would be inappropriate under present circumstances to hold public hearings and that national security interests required that the procedures for public notice and comment under the Treasury regulations not be followed.

10. I concluded that public hearings were inappropriate in this case because of the need to take immediate action with respect to petroleum imports. This was evident as a result of the Government's determination that voluntary conservation measures had not been sufficient in stemming imports of foreign oil. This development took place against the background and experience of the 1973 oil embargo, the increase in the price of imported petroleum and petroleum products, the seriously aggravated inflationary pressures in this country as a result of these price increases, our adverse balance of payments position, and the demonstrated risk to our national economy and security of future cutoffs of petroleum supplies.

11. At this point, I was aware that the question of petroleum imports and their impact on the economic welfare and the security of the country had been thoroughly studied in many hearings, both Congressional and administrative throughout the country during the past year, including: the nine-month Project Independence study conducted by the Federal Energy Administration during March through November, 1974, and the ten regional hearings in ten cities throughout the country (Denver, New York, Boston, Seattle, Chicago, Kansas City, Houston, Atlanta, Philadelphia and San Francisco) in connection with Project Independence.

12. As to any issue concerning the nature of my recommendation to the President, I was also aware that section 232 of the Trade Expansion Act of 1962, as amended, does not give to the Secretary of the Treasury the authority to decide on the form of adjustment to imports, leaving this decision to the discretion of the President. This section limits the Secretary to a determination on whether articles are being imported in such amounts or under such circumstances as to threaten to impair the national security and, if so, whether action

should be taken to adjust imports. I, therefore, concluded that appropriate commentary on the nature of any import restrictions that might arise as a result of a finding of a threat to the national security was not in order in the investigative stages and that those matters were committed by statute to the discretion of the President.

13. In view of these circumstances, I determined it was appropriate to dispense with the holding of public hearings in conducting an investigation of petroleum imports. I further determined that national security interests required that the procedures for public notice and comment under the Treasury regulations not be followed.

/s/ William E. Simon
WILLIAM E. SIMON

DISTRICT OF COLUMBIA) ss:

Subscribed and sworn to before me this 10th day of February, 1975.

[SEAL]

/s/ [Illegible]
Notary Public, D. C.

My Commission Expires
May 31, 1977.

[Caption Omitted]

AFFIDAVIT OF RUSSELL W. PETERSON

Russell W. Peterson, having been duly sworn, hereby states as follows:

1. I am Chairman of the Council on Environmental Quality (CEQ) which is responsible for guiding and monitoring the compliance of Federal agencies with the National Environmental Policy Act of 1969 (NEPA). (42 U.S.C. § 4321, *et seq.*; Executive Order 11514, March 5, 1970).

2. I am familiar with the issue raised in this case concerning compliance by the Federal Energy Administration (FEA) with NEPA before implementing Proclamation 4341 on February 1, 1975.

3. On or about January 10, 1975, officials of FEA consulted with CEQ regarding FEA's implementation of possible, prospective modifications of the Mandatory Oil Import Program (Program). On January 14, 1975, Secretary Simon submitted his report to the President under § 232 of the Trade Expansion Act concluding that continued importation of oil at present levels posed a threat to national security and advising that immediate action be taken to reduce such imports.

4. At that time CEQ was also informed that FEA was then negotiating a stipulated settlement of the case of *Natural Resources Defense Council* v. *Simon* (D. D.C., Civil Action 718-73). The issue presented in that case was whether NEPA required that an environmental impact statement (EIS) be prepared before Proclamation 4210 was issued in 1973 modifying the Oil Import Program. FEA stated that the stipulation would provide, among other things, that an EIS would be prepared concerning the Oil Import Program, and that, in the event the Program were to be further modified in the near future, the draft EIS would be due May 15, 1975, and would then cover the entire Program, as modified. In addition to preparation of the EIS, the stipulation would also provide that upon implementing any changes in the

Program which would significantly affect the quality of the human environment, including promulgation of changes in the oil import regulations, FEA would make available a general assessment of the environmental impacts of those changes.

5. After consulting with FEA, CEQ later agreed that the procedures proposed for the stipulation in *NRDC* v. *Simon* also were the best then available for satisfying the objectives of NEPA as to Proclamation 4341.

6. CEQ agreed that the procedure providing for the issuance of a general assessment of environmental impacts of any proposed changes in the Program would, on short notice, be the best option to provide the President, his advisors and the public with information on the environmental impacts of such proposed changes.

7. Thereafter, FEA consulted with CEQ prior to and during the preparation of FEA's general environmental assessment, now called the "Environmental Report on Modifications to the Mandatory Oil Import Program."

8. The FEA Environmental Report briefly describes short-term environmental effects of the changes in the Program occasioned by Proclamation 4341. And insofar as the Report describes short-term and long-term environmental effects, it provides general parameters for investigation of the environmental impacts of the Program as a whole.

9. CEQ agreed that the May 15, 1975 date by which a draft EIS was to be prepared was acceptable for several reasons. Because of the immediate implementation of the Proclamation deemed necessary by the President in the interest of national security, it would have been impossible to prepare an adequate draft EIS prior to the scheduled implementation of the Program on February 1. CEQ also considered that the immediate environmental effects of the imminent modifications to the Program would probably be insignificant. Finally, it was recognized that preparation of an EIS by May 15, 1975 provided the opportunity for full consideration of the more significant, long-term environmental impacts of the Program.

10. The FEA Environmental Report and the draft EIS due May 15, 1975, and its subsequent review, should provide a basis for considering the environmental impacts of the entire Program before irreversible decisions thereon have been made.

/s/ Russell W. Peterson
RUSSELL W. PETERSON
Chairman

Subscribed and sworn to before me
this 13th day of February, 1975.

/s/ Albert E. Brown
Notary Public

My Commission expires May 31, 1978.

[Caption Omitted]

AFFIDAVIT OF KENNETH R. WOODCOCK

I, Kenneth R. Woodcock, having been duly sworn, hereby depose and state:

1. I am currently the Associate Assistant Administrator for Environmental Programs of the Federal Energy Administration ("FEA"). Prior to this appointment, I was a technical staff advisor to the Assistant Administrator for Enforcement and General Counsel of the Environmental Protection Agency. My previous employment included environmental consulting for a private consulting firm. In my official capacity with FEA, I am responsible for environmental policy assessments and FEA's compliance with the National Environmental Policy Act.

2. The plaintiffs allege in their complaint that defendants violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, by failing to prepare and circulate for public comment an environmental impact statement ("EIS") on the Mandatory Oil Import Program prior to the issuance of Presidential Proclamation No. 4341, which substantially revised that program on January 23, 1975. Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires, *inter alia*, that prior to taking any "major Federal actions significantly affecting the quality of the human environment," an agency of the federal government is required to prepare a detailed statement on the environmental impact of and alternatives to such actions and to circulate such EIS for comment by other appropriate federal agencies and the public in accordance with guidelines issued by the Council on Environmental Quality ("CEQ Guidelines"). Section 102 of NEPA directs federal agencies to comply with the above requirements "to the fullest extent possible."

3. The CEQ Guidelines, set forth at 40 C.F.R. Part 1500, generally require that a "draft" EIS be prepared and circulated by the agency not less than 90 days prior

to the time the proposed action is to be taken and that a "final" EIS be prepared and circulated not less than 30 days prior to such action, but that the two periods may overlap. *See* 40 C.F.R. § 5100.11(b). The CEQ Guidelines also provide, at 10 C.F.R. § 1500.11(e), that:

> "Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the Federal agency proposing to take the action should consult with the Council about alternative arrangements."

4. In April 1973, shortly after President Nixon amended the oil import program by Proclamation No. 4210 (as described in the affidavit of Eric R. Zausner filed herewith) and long before FEA came into existence, three public interest environment organizations—the Natural Resources Defense Council ("NRDC"), the Environmental Defense Fund and the Friends of the Earth —filed suit in this Court seeking to compel the preparation of an EIS covering the oil import program as then in effect. (*NRDC* v. *Simon*, Civil Action No. 73-718.) In August 1974, after having been delegated authority to administer the oil import program in June 1974, FEA, without in any way conceding that NEPA applied to actions taken under the oil import program, agreed to prepare an EIS on the program and so indicated its intention to the plaintiffs in the *NRDC* litigation in answer to an interrogatory. On January 13, 1975, after there had been widespread public discussion to the effect that President Ford was considering amending the oil import program again to increase substantially the oil import fees, FEA and the plaintiffs in *NRDC* signed a stipulation (attached hereto as Attachment A), agreeing that, in view of FEA's stated commitment to complete a draft EIS on the entire program by May 15, 1975, and its further commitment to prepare promptly a brief statement describing the environmental impacts of any amendments to the program implemented prior to completion of the EIS, the litigation should be dismissed without prejudice. This stipulation was filed with the court and was approved by Judge Sirica on February 4, 1975. See Attachment A.

5. The steps which FEA has taken in connection with the recent changes in the oil import program to comply with NEPA and the CEQ Guidelines to the fullest extent possible (as well as to comply with the stipulation and order in *NRDC* v. *Simon*) are as follows:

a. On January 9, 1975, only a few days after the President decided in principle on his changes in the oil import program and before that decision was announced publicly, FEA officials met to discuss the preparation of a brief statement of the kind called for in the proposed *NRDC* v. *Simon* settlement. On January 10, 1975, FEA officials met with CEQ officials, in accordance with § 1500.11(e) of the CEQ Guidelines, to describe the anticipated environmental consequences of the expected new program and to explore with CEQ how best to modify the CEQ's normal procedures so as to take into account the President's decision to make the changes effective almost immediately. The CEQ officials present at that meeting and in subsequent meetings held through January 14, 1975, agreed in principle that the proper way in which to effectuate compliance with NEPA under the circumstances was for FEA to prepare and circulate to other appropriate federal agencies and to the public the abbreviated environmental report called for in the proposed *NRDC* v. *Simon* settlement and to proceed with the preparation of a full programmatic impact statement by May 15, 1975. *See* Affidavit of Russell W. Peterson, Chairman of CEQ, filed herewith.

b. FEA made computer assessments of the environmental implications of the expected changes in the oil import program on Saturday, January 11, 1975, analyzed the data obtained, and prepared a draft environmental report by January 14, 1975. On January 14, 1975, FEA circulated the draft to the Environmental Protection Agency, the Department of Interior and CEQ. FEA received their comments by January 17, 1975, and as-

sembled the final report by January 21, 1975. A copy of that report, entitled "Environmental Report on Modifications to the Mandatory Oil Import Program," is attached hereto as Attachment B.

c. On January 23, 1975, the date of the President's Proclamation, FEA made the report publicly available. Notice of the issuance of FEA's environmental report was contained in the preamble to the FEA regulations, implementing the new Presidential Proclamation, and was published in the *Federal Register* on January 31, 1975 (40 F.R. 4771). A copy of the report has been made available for public inspection at FEA's public reading room.

6. The attached environmental report addresses both long-term (1975-85) and short-term (1975-77) potential environmental impacts of the so-called "base case" and "import fee" scenarios in terms of the effect of projected energy price changes as well as the potential impact of new energy facilities. The report also briefly describes the draft EIS now in preparation which will take into account the new fee schedule. While the current import fee program is expected to be modified upon passage of a comprehensive package of energy and economic legislative proposals that the President has recommended to Congress for immediate action (as described in the Affidavit of Eric R. Zausner), the approach taken in FEA's environmental report on the new program was to assume an indefinite life for the import fees that have been announced and to analyze the environmental impact of these fees and other actions to be taken by the President, without regard to the President's more comprehensive legislative proposals.

7. The environmental impacts that might result from the new import fee program before FEA completes its EIS on May 15, 1975, will be negligible and, if anything, slightly positive. Not until May 1975 will it be possible for the full $3.00 per barrel fee on crude oil and $1.20 per barrel fee on products to be passed on to consumers, and it will probably take a few additional months before the full effect of those fees will have a

perceptible impact in the marketplace. Because of the inability to produce additional supplies of alternative fuels (*e.g.*, natural gas, coal, or domestically-produced oil) within a short period of time, the only significant effect of the new fees within the next several months is likely to be a reduction in consumption of petroleum products. *See* Attachment B at 26-27. Any immediate reduction in, for example, automobile usage due to increases in the price of gasoline would be reflected in a reduction in the automobile-related pollutants such as hydrocarbons, carbon monoxide and nitrogen oxides. In addition, any reduced importation of crude oil and petroleum products will reduce the likelihood of accidental petroleum discharges into the marine environment. Finally, any reduced crude oil imports will result in a reduction of pollutants associated with refinery operations. Other environmental changes would not be expected in the various energy consuming sectors due to the leadtime necessary to make appropriate conservation or fuel shifting investments, such as utility oil-to-coal switching, residential or commercial insulation retrofits, or the replacement of inefficient industrial processes. Short-term environmental impacts resulting from development of alternative energy sources similarly are not expected due to the long leadtime required for the development of such sources as new coal mines, off-shore oil and gas wells, nuclear power plants and the like.

8. For these reasons, the FEA Administrator will have the benefit of a draft EIS on the recent amendments to the oil import program before any adverse environmental impact is expected to result. The EIS will be available at about the same time that the President is likely to reconsider the program in light of the action that Congress takes or fails to take on the remainder of the President's energy package.

9. In connection with the draft EIS, substantial professional resources have been and will be required to prepare it. Thus far, approximately 0.3 man-years of professional efforts from FEA, other federal agencies and contractors have been invested in the project. An additional 1.7 man-years from an interdisciplinary team

of experts will be required to complete the EIS. Energy and Environmental Analysis, Incorporated ("EEA") is entering into a contract with FEA to provide most of the necessary environmental and economic assistance. The president of EEA, Dr. Robert L. Sansom, is the immediate former Assistant Administrator for Air and Water Programs of the Environmental Protection Agency. Dr. Sansom was responsible for energy and environmental issues at EPA and served on Treasury Secretary Simon's "kitchen cabinet" for energy matters. The principal EEA investigator for the project will be Dr. Michael Lerner, previously an energy advisor to the Administrator of EPA and a member of the Technical Group of the Oil Policy Committee involved in the development of the oil import program between 1971 and 1973. In addition, Dr. Lerner served as the Director of FEA's residual oil allocation program during last winter's oil embargo. EEA has had prior experience in preparing environmental assessments for FEA. The contractor will assist officials in FEA's Office of Conservation and Environment, including myself and others that have been assigned to the preparation of the EIS. The draft EIS will include input from other federal agencies and from environmental organizations outside the government.

10. FEA plans to have a preliminary draft of the EIS by April 11, 1975, which will be circulated to EPA, CEQ, the Department of Interior, the Energy Research Development Administration, the Federal Power Commission, and the Department of Transportation for a two week review and comment period prior to publication of the draft EIS on May 15, 1975.

11. The draft EIS will assess potential short- and long-term environmental impacts of both the current mandatory oil import program and of alternative programs. It will examine such potential impacts on a regional as well as national basis. And, it will consider possible alternatives to increased import fees, including such selective demand reduction measures as a gasoline tax, gasoline rationing and electric utility conservation measures, and such comprehensive demand reduction measures as a mandatory import quota system and the

rationing of all fuels (not merely gasoline). The statement will also include an assessment of potential environmental impacts of supply enhancement measures, including enhancement of the supply of conventional resources, such as oil, gas and coal, as well as emerging technologies such as geothermal, solar, and synthetic fuel processes, and of mandatory conversions to more plentiful energy sources. Finally, the analysis will include an assessment of a "no-action" alternative.

12. It is my understanding and belief that the foregoing comprehensive plan and procedures for preparing an environmental impact statement on the oil import program is fully consistent with the mandate of Section 102 of NEPA, which requires that, "to the fullest extent possible," major Federal actions significantly affecting the quality of the human environment be accompanied by an EIS.

/s/ Kenneth R. Woodcock
KENNETH R. WOODCOCK

Subscribed and sworn to before me this day of February, 1975.

Notary Public

[Caption Omitted]

AFFIDAVIT OF ERIC R. ZAUSNER

I, Eric R. Zausner, having been duly sworn, hereby depose and state:

1. I am Assistant Administrator of the Federal Energy Administration ("FEA") for Policy and Analysis, having been duly appointed to that post by the President with the advice and consent of the Senate. I am currently also the Acting Deputy Administrator of FEA. In those positions, I have played a major role in developing and analyzing the President's comprehensive energy program announced in his State of the Union Address of January 15, 1975, including the revised Mandatory Oil Import Program at issue in the present litigation, and I have consulted with the Administrator of FEA, Frank G. Zarb, with respect thereto. In addition, I was responsible for the development and preparation of the *Project Independence Report*, an in-depth analysis of the Nation's energy problems between now and 1985, which FEA submitted to the President in November 1974. In the process of preparing that report, extensive public hearings were conducted throughout the United States to hear debate on virtually all aspects of national energy policy.

I. *The Circumstances Surrounding the President's Decision to Increase Oil Import Fees.*

2. Since the fall of 1973, world market conditions for petroleum and refined petroleum products have substantially changed. The crisis nature of the alterations has been recognized in both Executive and Congressional actions, including the passage and extension of the Emergency Petroleum Allocation Act of 1973 ("EPAA") and the creation of the Federal Energy Administration. The effect of the various voluntary and mandatory actions and programs adopted since the fall of 1973 to respond to changes in the petroleum market has been continuously monitored by various agencies of the Federal Government, including FEA. As described in paragraphs 17-18 below, an investigation by the Secretary of Treasury, pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and consultation with several Federal agencies, has resulted in a finding that crude oil and petroleum products are being imported in such quantities and under such circumstances as to threaten to impair the national security.

3. Last winter's oil embargo, for example, resulted in a significant drop in our gross national product and the loss of employment for approximately 500,000 persons. Steadily increasing demand for oil and a declining domestic supply, coupled with last winter's overnight tripling in the posted price of foreign oil, has caused the expenditure for imported oil, which was $3 billion in 1970, to leap to $24 billion in 1974. It has been projected that this figure will increase to $12 billion by 1977, when approximately eight million barrels per day will be imported, at least half of which would be vulnerable to embargoes, if nothing is done to reduce our increasing dependence on imports. It has also been estimated that an embargo of 4 million barrels per day could result in more than one million additional unemployed persons, with the most immediate adverse impact felt in those regions of the country where dependence on petroleum imports is greatest, *e.g.*, the Northeast.

4. Each week or month of delay in tackling the oil import problem, therefore, results in increased dependence on imports which will only make it more difficult and costly to reverse the trend at a later time. Any delay also means an additional span of time in which this nation is subject to international coercion through embargoes and monopolistic price increases by the producing nations. It was under these extreme circumstances that the President decided to take immediate action pursuant to 19 U.S.C. 1862(b) to adjust imports of crude oil and petroleum products so as to reduce our vulnerability to embargoes and similar actions which he and the Secretary of Treasury, after extensive investigation, found to constitute a threat to the national security.

5. On January 15, 1975, in the State of the Union Address (attached hereto as Attachment A), President Ford announced his goals for reducing the Nation's dependence on petroleum imports and a comprehensive implementing program of legislative proposals and administrative actions. This program prescribed both long and short term measures to reduce U.S. energy demand and increases in domestic production. The President's goals included, in the short-term, a reduction in total imports of one million barrels per day by the end of 1975 and two million barrels per day by the end of 1977.

6. Because of the magnitude of actual or threatened energy related problems and because time will be required for Congressional action on the President's legislative proposals, the President decided, as an interim measure, to take immediate action pursuant to 19 U.S.C. 1862(b) to increase import fees on crude oil and petroleum products and thereby start the process of reducing the Nation's dependence on imported oil and petroleum products. The import fees, which are the subject of this action, are, as explained by the President, intended to be in effect only until a more comprehensive legislative program has been enacted, at which time they would be modified. The President specifically requested that the Congress enact his entire legislative program within 90 days, or by the end of April 1975. As part of his interim program, the President also announced that he would take steps to remove price controls on domestic crude oil by April 1, 1975, pursuant to Section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973, as amended ("EPAA"). Thus, the short-term increase in import fees is only the critical first step in a series of carefully coordinated steps planned by the President to reduce the Nation's dependence on foreign oil. The President's entire legislative package, including his tax proposals and the Energy Independence Act of 1975, are described more fully in the State of the Union Address (Attachment A hereto).

7. On January 23, 1975, the President signed Proclamation No. 4341, which amended Proclamation No. 3279

so as to impose substantially increased fees on crude oil and petroleum products imported into the United States. Proclamations No. 4341 and 3279 are attached hereto as Attachments B and C, respectively. In brief, Proclamation No. 4341, first, causes fees on imported crude oil and petroleum products, as imposed in 1973, to be accelerated to their maximum levels of $0.21 and $0.63 per barrel, respectively, and, second, imposes a supplemental fee on imported crude oil of $3.00 per barrel and on imported petroleum products other than ethane, propane, butanes, and asphalt of $1.20 per barrel. These supplemental fees increase gradually on imported crude oil from $1.00 in February to $2.00 in March and to $3.00 in April 1975 and on imported petroleum products to an effective level of $0.60 in March and $1.20 in April 1975. In addition, the new oil import program has been structured to integrate that program with FEA's Mandatory Petroleum Allocation and Price Regulations.

8. The increased import fees are interim measures and must be considered together with the other elements of the President's total energy program. For example, if Congress enacts the President's comprehensive energy legislation and permits the price of domestic crude oil to be decontrolled the following additional measures to reduce demand and increase production would be taken to modify and supplement the new import fee program:

a. An excise tax of $2.00 would be imposed on every barrel of domestic crude oil;

b. The new import fees of $3.00 on crude oil and $1.20 per barrel on petroleum products would both be adjusted to $2.00 per barrel when the excise tax is enacted;

c. New production of natural gas would be freed from price controls and a tax equivalent (on a B.t.u. basis) to the $2.00 per barrel excise tax and import fees would be imposed on all natural gas to encourage new production, to discourage switching from oil to already-scarce natural gas, and to reduce the serious and growing unemployment problems associated with natural gas curtailments;

d. A tax, retroactive to January 1, 1975, would be imposed on domestic crude oil to capture windfall profits resulting from decontrol;

e. Most of the approximately $30 billion in revenues raised annually by the proposed energy conservation taxes and import fees will be returned to the economy primarily in the form of tax cuts to individuals and corporations;

f. Conversion of power generating plants from oil to coal-fired would be accelerated through amendments to the Clean Air Act of 1970 and the Energy Supply and Environmental Coordination Act of 1974;

g. In addition, the President proposed legislation to authorize utilization of the Naval Petroleum Reserve No. 1 at Elk Hills, California, for production of about 160,000 barrels per day in 1975 and 300,000 barrels per day by the end of 1977.

9. FEA's most recent projections indicate that the President's comprehensive energy program would result in a reduction in petroleum imports of 1,094,000 barrels per day by December 1975. (See FEA Technical Report 75-2, February 1975, attached hereto as Attachment D.) It is my judgment that even if Congress fails to act on the President's comprehensive legislative program and thus the interim import fee system remains in effect, there would be a significant short-term reduction in imports of approximately 400,000 to 500,000 barrels per day in 1975 (assuming decontrol of domestic crude oil prices) or about half of the goal set by the President for his entire energy package.

II. *The Pre-existing Statutory and Regulatory Framework on Oil Imports*

10. The President issued Proclamation No. 4341 pursuant to his constitutional and legal authority, including Section 232 of the Trade Expansion Act of 1962, as amended by the Trade Reform Act of 1974. Section 232(b) provides, in relevant part, that if, as a result of

an investigation conducted by the Secretary of the Treasury, it is determined that an article is being imported into the United States "in such quantities or under such circumstances as to threaten to impair the national security," then the President is to be promptly advised, and the President unless he determines otherwise

> "shall take such action, and for such time as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security."

Section 232(c) of that Act sets forth several factors to be considered by the Secretary and the President in making the determination under Section 232(b)—that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

11. On March 10, 1959, under authority of the predecessor of Section 232, President Eisenhower instituted a Mandatory Oil Import Program by issuing Proclamation No. 3279 which established a system of oil import quotas administered by the Secretary of the Interior. See 19 U.S.C. 1862, note. That proclamation was based on a determination that foreign crude oil and its principal derivatives were being imported into the United States in such quantities and at such low costs as to threaten the development of domestic petroleum production and refinery capacity, and thereby threatened to impair the national security.

12. The original Mandatory Oil Import Program did not fully achieve its objectives. Despite its purpose of assuring non-dependence on foreign sources of oil, the gap between domestic production and consumption, which had to be filled with imports, continued to rise, and Proclamation No. 3279 was amended several times by each succeeding President to allow increased quotas to meet the growing domestic demand. The following table indicates the increasing degree of U.S. reliance on foreign sources of oil:

U.S. Production and Consumption of Petroleum (Millions of barrels/day)

Year	Production of Crude, Condensates & Natural Gas Liquids	Consumption of Refined Products	Imports of Crude Oil & Refined Products
1960	8.0	9.7	1.8
1965	9.0	11.5	2.5
1970	11.3	14.7	3.4
1972	11.2	16.4	4.7
1973	10.9	17.3	6.2

13. The use of oil import quotas was continued with amendments from time to time, until early 1973, at which time President Nixon issued Proclamation No. 3279 to eliminate volumetric restrictions on imports (quotas) and to substitute a fee system. The fee system was to be phased in gradually, with importers who had imported under a quota continuing to bring an amount of oil equal to their old quota levels into the country on a fee-free basis. Crude oil and petroleum products could be imported in excess of the old quota levels, however, by payment of a license fee which was to be gradually increased until, by the end of 1975, it would be $0.21 on each barrel of imported crude oil and $0.63 on each barrel of covered product (except for imports from Canada). The right to import a certain amount fee-free, based on the old quota levels, would be phased out gradually until 1980, when license fees would have to be paid on all imports covered by Proclamation No. 4210.

14. The import fee system established in 1973 by Proclamation No. 4210 was designed to provide an economic incentive to increase domestic production and refinery capacity while allowing greater levels of imports into the United States, over and above the quotas established by the earlier program, albeit at slightly higher cost due to the import license fees. This change in the program was necessitated by the fact, as indicated in the table in paragraph 12 above, that U.S. domestic

supplies were not keeping pace with rapidly increasing demand, and one short-term means of meeting this increase in demand was through increased reliance on imports. Therefore, existing tariffs on oil were suspended and imports in excess of existing quota levels were authorized, but moderate import fees were applied to imports of crude oil in excess of the gradually diminishing quota levels in order to maintain some long range disincentive to import crude oil at the expense of increased domestic production. A higher fee was set on petroleum products in order to encourage construction of increased domestic refinery capacity.

15. President Ford's Proclamation No. 4341 built upon this existing import fee program. Those provisions of Proclamation 3279, as amended, which established different quantitative ceilings for different regions continue to have limited effect in that holders of fee-free licenses are not required to pay the pre-existing $0.21 or $0.63 import fees. When the quota system was eliminated by Proclamation No. 4210 of April 19, 1973, it was decided that the changes could not be made abruptly, but would have to be done gradually to avoid putting an unfair economic hardship on the numerous persons and companies that had invested millions of dollars based on the policies of the old quota system. Thus, fee-free licenses were granted up to the levels of the old quotas, with the availability of such fee-free licenses being phased out over a seven year transition period. (A brief description of the regional aspects of the old quota system and the gradual phase-out of regional variations under the license fee program in Proclamation No. 4210 is attached hereto as Attachment E.) In contrast, the supplemental fees imposed by Proclamation No. 4341 apply to all imports of oil and petroleum products, with no fee-free allocations and therefore no regional variations.

16. As previously noted, the supplemental oil import fees imposed by the President are integrally related to FEA's Mandatory Petroleum Allocation and Price Regulations which provide, *inter alia*, for the "equitable distribution of crude oil, residual fuel oil and refined petroleum products at equitable prices among all regions."

This regulatory scheme is described in Attachment F and includes a discussion of FEA's "two-tier" pricing system and its allocation program for price-controlled oil, the "Old Oil Allocation Program."

III. *The President's New Import Fee Program and Necessary Modifications of FEA Regulations*

A. *The National Security Findings of the Secretary of Treasury*

17. On January 14, 1975, Treasury Secretary Simon submitted to the President, pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, a report, resulting from an investigation instituted under that Section, in which he found

> "that crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar are being imported into the United States in such quantities as to threaten to impair the national security. I further find that the foregoing products are being imported into the United States under such circumstances as to threaten to impair the national security."

In view of this finding, Secretary Simon recommended to the President "that appropriate action be taken to reduce imports" of such products. The report of Secretary Simon is attached hereto as Attachment G.

18. Secretary Simon's finding and recommendation were based upon an investigation conducted by the Assistant Secretary of the Treasury for Enforcement, Operations and Tariff Affairs, dated January 13, 1975, which concluded that

> "petroleum is being imported in such quantities and under such circumstances as to threaten to impair the national security of this country."

The report of the Assistant Secretary's investigation is attached hereto also as Amendment G. As indicated therein, the foregoing finding was arrived at on the basis of

information and advice from the Secretaries or other senior officials of the Department of Defense, Commerce, State, Interior and Labor and the Council of Economic Advisors as well as the FEA. The FEA had previously held extensive public hearings throughout the United States on the question of energy policy in connection with the preparation of its *Project Independence Report.*

19. On January 23, 1975, after receiving the national security finding of Secretary Simon and the recommendation of the Administrator of FEA that substantially increased import fees be imposed, the President signed Proclamation No. 4341 and authorized the FEA Administrator to promulgate regulations to implement the proclamation and to conform the pertinent existing FEA regulatory programs to the President's new import fee program. On January 28, 1975, FEA promulgated complementary regulations in accordance with the terms of the new proclamation, 40 F.R. 4771, a copy of which is attached hereto as Attachment H. FEA has also issued a notice of proposed rulemaking to conform the Old Oil Allocation Program to the new import fee program, which appears at 40 F.R. 3467 (January 22, 1975). A summary of the measures contained in the amended Proclamation of January 23 and corresponding modifications of FEA's regulations, both of which will remain in effect until the Congress acts on the President's more comprehensive legislative proposals, are contained in the following paragraphs.

B. *The President's New Import Fee Program*

20. *The Pre-existing Import Fees.* The pre-existing import license fee program imposed in 1973 by Presidential Proclamation No. 4210 will remain in effect under the new program, but the fees will be accelerated immediately to their maximum levels of $0.21 per barrel for crude oil and $0.63 per barrel for petroleum products, rather than being phased-in to those levels under the prior program. Except for imports from Canada, on which increases will be slightly higher, this represents an increase over present fees of only $0.03 per barrel

for imported crude oil, $0.35 per barrel for imported gasoline and $0.21 per barrel for all other imported petroleum products. With the exception of Canadian imports, which were on a longer phase-in schedule and would not have reached the same maximum levels until 1980, the pre-existing schedule would have resulted in maximum levels being reached by November 1, 1975. Thus, the impact of the immediate acceleration of pre-existing fees to maximum levels is relatively minor, particularly in light of the large amount of imports that are not subject to these fees, as explained in the following paragraph.

21. *Pre-existing Fee-Free Licenses.* Under the pre-existing program, importers were granted fee-free licenses for a specified percentage of their imports based on their refinery capacity These fee-free levels were comparable to the old quota levels. For May 1, 1974 to May 1, 1975, for example, the percentage of fee-free imports was scheduled to be 90 percent of historical levels. The percentage of fee-free allocations decreases in yearly stages, reaching zero by 1980. Under the new program, the phase-out system of fee-free allocations is continued with respect to the pre-existing license fees described in paragraph 20 above, as adjusted to their maximum levels. No fee-free allocations are permitted, however, with respect to the imposition of any supplemental import fees.

22. *Supplemental Import Fees.* In addition to the pre-existing import fees on crude oil and petroleum products, an additional fee of $1.00 is imposed effective February 1, 1975, to be increased by an additional $1.00 effective March 1, 1975, and by another $1.00 effective April 1, 1975, for a total phased-in supplemental fee of $3.00 per barrel.

23. *Reduction of Fees on Refined Products.* Once a decision was made to increase substantially oil import fees, it became apparent that that portion of FEA's Old Oil Allocation Program that is designed to provide price relief to importers of refined petroleum products (as described in Attachment F) could better be accomplished by providing them relief in the form of reductions in the

oil import fee. The relief provided to product importers by the Old Oil Allocation Program was confined to a limited class of historical importers of residual oil and No. 2 oils. These limitations were imposed principally because further expansion of the class of importers given such favored treatment would have unduly complicated the program. However, the provision of such favored treatment to all importers of all refined products pursuant to the oil import fee program can be achieved relatively easily by simply imposing an import fee on refined products at a relatively lower level than that on crude oil. Thus, the President's January 23 Proclamation provides that the supplemental fee on imported petroleum products shall be less than the supplemental fee on crude oil in the same approximate dollar amount as the value of an "entitlement" issued under the Old Oil Allocation Program to an importer for imports in November 1974, or $0.60. In addition, the President's Proclamation provides that the supplemental fee on imported products shall be further reduced by 40 percent of the value of the supplemental fee on crude oil. This was done in order to maintain price parity between resellers of domestically refined products and resellers of imported products with respect to increased costs attributable to the supplemental import fees. The amount of this further reduction was calculated on the assumption that since the increased cost of the supplemental fees on crude oil will be effectively 40 percent price-controlled, because it will be spread among all domestic refiners of crude oil by the Old Oil Allocation Program, the fees on imported products should likewise be reduced by 40 percent to allow resellers of imported products to remain competitive with resellers of products refined domestically. Therefore, the fee on imported refined products will be zero in February ($1.00, less $0.60 and 40 percent of $1.00), $0.60 in March ($2.00, less $0.60 and 40 percent of $2.00), and $1.20 in April and hereafter ($3.00, less $0.60 and 40 percent of $3.00). (For a thorough discussion of the pertinent FEA price and allocation regulations which necessitated these adjustments see Attachment F.)

24. *Administration of the oil import program.* The responsibility to administer the oil import program under Proclamation No. 3279, as amended, originally rested with the Secretary of Interior. On June 27, 1974, the President transferred this responsibility to the Administrator of FEA. See Executive Order 11790, 39 F.R. 23185 (June 27, 1974) and Section 6(a)(4) of the Federal Energy Administration Act of 1974. FEA's oil import regulations appear at 10 C.F.R., Parts 206 and 213. See Attachment H. Under the FEA regulations, importers must apply to FEA's Director, Oil Imports, for an allocation and license to import and must submit to FEA payment or an acceptable surety bond in lieu of payment for the full amount of the fees applicable to the requested importation. The Director decides who is entitled to receive allocations and licenses and may revoke or suspend a license for violation of FEA's oil import regulations or of Proclamation No. 3279, as amended, or if he finds it is in the interest of national security as determined by the Administrator of FEA after consultation with the Secretaries of State, Treasury and Defense. Once a license has been issued by FEA, it must be presented to the District Director of Customs at the appropriate port of entry to remain in his possession until it is fully utilized, whereupon the license is returned to FEA's Director, Oil Imports. Customs officials are authorized to perform other ministerial acts on behalf of FEA, such as acknowledging receipt of an importer's report to FEA of amounts imported. Customs is also authorized by FEA's regulations to permit up to 550 U.S. gallons of oil imports, for specified uses, into the country without a license as well as to permit fee-free entry of bonded fuel aboard an aircraft diverted from an international flight. In accordance with Section 5(a) of Proclamation 3279, as amended, a special Oil Import Appeals Board, consisting of representatives from FEA and the Departments of Justice and Commerce, with the FEA member as chairman, has been established to review petitions of persons affected by decisions under the FEA regulations issued pursuant to the Proclamation. The Appeals Board is

subject to the general direction of the Administrator of FEA. A petition to the Appeals Board is the sole and exclusive means by which a party may appeal from a decision concerning the issuance, revocation or suspension of a license or allocation, the grant or denial of a refund, or the modification of a license.

C. *Corresponding Modifications in FEA's Mandatory Petroleum Allocation and Pricing Reglations*

25. *Changes in the Timing of Cost Passthroughs.* A requirement that import fees be paid at the time importation could have caused significant cash flow problems for many importers of crude oil and refined products. Moreover, these problems would have been particularly severe considering the delay in the timing of increased cost passthroughs under FEA regulations applicable to refiners. While the FEA price regulations allow resellers to pass through increased product costs in the month in which they are "incurred", they do not permit refiners to pass through their increased crude oil costs until the month following the month in which they are "incurred." Thus, an import fee on crude oil incurred by a refiner in February could not be passed through in increased prices until March. Moreover, while a refiner who is particularly dependent on imported oil will have the advantage of being a net seller of entitlements under the Old Oil Allocation Program (See Attachment F), such refiner would not receive revenues from those entitlements until two months after the importation has occurred. In order to soften the effect on cash flows caused by such time lags, the supplemental import fees were not made payable until the last day of the month following the month in which the importation occurs, provided that the importer posts a bond sufficient to insure such payment when it becomes due. For importers that posted bonds for licenses issued under the pre-existing import program, no new bond will be required. Moreover, for purposes of cost passthroughs under FEA's price regulations, the import fees

will be deemed to have been "incurred" when the importation occurs, rather than when the fee is actually paid. This means that no actual economic effect of the President's new oil import program will be felt until March 1, 1975, at the earliest, except for the insubstantial costs of surety bonds. This is so in the case of refiners because the $1.00 per barrel fee applicable to imports of crude oil in February would not be payable by the refiner until March 31, 1975, and the refiner could not pass through to its customers the increased costs resulting from the February 1 fee until March 1 at the earliest. This delayed financial impact is also applicable to resellers of refined products because there will be no fee on products in the month of February for the reasons described in paragraph 23 above. (A chart describing the month-by-month timing of the price effects of the increased import fees and of the proposed amendments to the Old Oil Allocation Program is attached hereto as Attachment I.)

26. *Cash Flow Relief for Certain Small Refiners.* Those few small refiners (with 30,000 barrels per day capacity or less) that are *buyers* of entitlements under the Old Oil Allocation Program are now being phased into the crude equalization program under Special Rule No. 3 to that program, 10 C.F.R. § 211.67, in view of their particularly acute cash flow problems. Special Rule No. 3 provides that such small refiners shall be relieved of the obligation to buy entitlements in January for crude oil refined in November, and shall be required to purchase only one-third the amount they would otherwise be required to purchase in February for runs in December, and two-thirds that amount in March. Since the financial burdens on those small refiners which are buyers of entitlements will be increased by the higher cost of entitlements resulting from increased import fees, FEA has issued an emergency amendment to Special Rule No. 3 by one month (so that small refiners also will be freed of the obligation to purchase entitlements for December crude runs, will have only one-third their obligations for January, etc.) to help mitigate the increased impact on those refiners.

27. *Amendments to FEA's Price Regulations Related to Increased Import Fees.* Certain changes in FEA's price regulations have also been proposed to help assure that increased costs of crude oil and refined products resulting from increased import fees are equitably applied by refiners to product prices and to assure that they do not allocate a disproportionate share of such increased costs to heating oils and other fuels upon which certain areas of the country, including the Northeast, are particularly dependent. (40 F.R. 3467, January 22, 1975). In order to accomplish this, FEA has proposed to abolish its "special products rule," which prohibits a refiner from allocating a disproportionate share of its increased costs to middle distillates (including No. 2 heating oil and No. 2-D diesel fuel) and gasoline but does allow a disproportionate share to be allocated to "other covered products," which include residual oil. Under the proposed revision, not more than a proportionate share of increased costs could be allocated to the prices of No. 2 oils and to other "general refinery products," which include residual oil, but a disproportionate share could be allocated to gasoline. In this manner, No. 2 oils and those products which are relatively price inelastic (and on which the Northeast is disproportionately dependent) would not be made to bear a disproportionate share of increased costs, while gasoline, which is more price elastic (and on which the Northeast is not disproportionately dependent), could be targeted for a greater percentage of the increased costs resulting from higher import fees.

IV. *Impact of the President's New Import Fee Program*

A. *Projected Economic Impact*

28. The President's energy program, which in the short term seeks to encourage conservation of petroleum through the imposition of import fees, will increase energy costs throughout the United States. It is projected, however, any significant economic impact of these

increased energy costs will be offset by the President's proposed across-the-board tax rebate program. See paragraph 8e above.

29. The increased fees on imported crude oil and petroleum products will result in higher costs to all consumers of petroleum products. Modifications in the Old Oil Allocation Program and FEA's price regulations, however, insure that the across-the-board increases in the unit cost of petroleum products will be equal throughout the United States.

30. Although per unit costs of petroleum products are going to increase on an equal basis throughout the United States as a result of the increased fees, some regions such as the Northeast (particularly the New England states), are going to experience somewhat greater increases in their total energy costs because they depend disproportionately on petroleum products to satisfy their total energy requirements and because of other factors peculiar to those regions. For example, in the case of New England, increased import fees will have a impact because: (1) New England depends on petroleum for approximately 86 percent of its energy requirements versus a U.S. average of 46 percent; (2) New England has no refineries and therefore must pay added transportation costs to bring domestically refined fuel into the region; (3) household consumption of petroleum products in New England exceeds the national average by about 60 percent; and (4) New England basically lacks access to lower-cost energy sources, such as hydroelectric power, nuclear power, natural gas or coal. The following table vividly demonstrates the relative reliance by New England and other Northeastern states on petroleum products, as compared to the overall U.S. average:

ENERGY CONSUMPTION BREAKDOWN:
NORTHEASTERN STATES AND THE U.S. AVERAGE

State	Percentage of Total Energy Consumption				
	Coal	Petroleum	Natural Gas	Hydropower & Nuclear	Total
Maine	0%	94%	0%	6%	100%
N. Hampshire	13	74	7	6	100
Vermont	1	87	0	12	100
Mass.	0	86	12	2	100
R. Island	0	88	12	0	100
Conn.	1	79	9	11	100
New York	8	67	17	8	100
New Jersey	2	77	19	2	100
U.S. Average	17.3%	45.7%	32.1%	4.9%	100%

31. While the increased oil import fees may impact somewhat differently upon different regions due to regional variations in energy usage, as noted, no region in the country will bear a disproportionate share of the petroleum cost increases. Furthermore, the net effect of the President's comprehensive energy program outlined in paragraph 8 above would basically be to equalize energy cost increases throughout the United States. A summary of the major economic effects of the President's comprehensive energy program is attached hereto as Attachment J.

B. *Potential Environmental Impact*

31. On January 23, 1975, the same day the President signed Proclamation No. 4341, FEA published a report entitled "Environmental Report on Modifications to the Mandatory Oil Import Program." A copy of that report is attached to the affidavit of Kenneth R. Woodcock

submitted herewith.* That report includes a computerized analysis of the potential short-term (1975-1977) and long-term (1975-1985) impacts of the increased import fees on the environment. While the new import fees are expected to be modified upon passage of the President's comprehensive energy conservation legislation, the analysis in FEA's environmental report has assumed that the new fees will be effective indefinitely in order to isolate their potential environmental effects from the rest of the President's energy program.

32. It is my opinion and therefore my belief, based on the above-mentioned environmental report, that any short-term environmental impacts that might result from the new import fee program, prior to FEA's planned publication of an environmental impact statement by May 15, 1975, will be negligible and, if anything, slightly positive. My belief is based on the following considerations: (1) the passthrough of increased product costs attributable to the new fees will be delayed at least one month by FEA's price regulations (as described in paragraph 25 above); (2) it will take a few additional months for such price increases to begin to have a perceptible effect on consumer behavior in the marketplace; (3) it is virtually impossible between now and May 15, 1975 to increase current levels of alternative fuel supplies such as nuclear power, natural gas, coal or domestically-produced oil, since the leadtime for new production from these energy sources is often several years; and (4) even if alternative fuel supplies were available, it would not be possible to utilize them without first converting our present oil-fired facilities to accept them, a process which would also take several months or years to complete. Thus, the only significant impact of the new import fees within the next several months is likely to be a reduction in domestic consumption of petroleum

* As Mr. Woodcock's affidavit indicates, FEA has commenced preparation of an environmental impact statement on the new fee program in accordance with the requirements in Section 102(2)(C) of the National Environmental Policy act of 1969. 42 U.S.C. 4332(2)(C). FEA plans to publish a draft of this statement by May 15, 1975.

products, which can only benefit the environment. For example, a reduction in automobile usage due to increased gasoline prices would cause a reduction in automobile-related pollutants such as hydrocarbons, carbon monoxide and nitrogen oxides. Likewise, reduced importation of petroleum would reduce the incidence of oil spills. Accordingly, I believe that before the new oil import program will have any significant impact on the human environment, FEA will have prepared and circulated for comment a comprehensive environmental impact statement on the new import fee program.

/s/ Eric R. Zausner
ERIC R. ZAUSNER

Subscribed and sworn to before me
this day of February 1975.

Notary Public

My commission expires:

THE PRESIDENT'S 1975

STATE OF THE UNION MESSAGE

INCLUDING ECONOMY AND ENERGY

EMBARGOED FOR RELEASE
UNTIL 1:00 P.M., EST

EMBARGOED FOR WIRE TRANSMISSION
UNTIL 10:00 A.M., EST

JANUARY 15, 1975

Office of the White House Press Secretary

THE WHITE HOUSE

TO THE CONGRESS OF THE UNITED STATES:

Twenty-six years ago, a freshman Congressman, a young fellow, with lots of idealism who was out to change the world, stood before Speaker Sam Rayburn in the well of this House and solemnly swore to the same oath you took yesterday. That is an unforgettable experience, and I congratulate you all.

Two days later, that same freshman sat in the back row as President Truman, all charged up by his single-handed election victory, reported as the Constitution requires on the State of the Union.

When the bipartisan applause stopped, President Truman said:

"I am happy to report to this Eighty-first Congress that the State of the Union is good. Our Nation is better able than ever before to meet the needs of the American people and to give them their fair chance in the pursuit

of happiness. It is foremost among the nations of the world in the search for peace."

Today, that freshman Member from Michigan stands where Mr. Truman stood and I must say to you that the State of the Union is not good.

Millions of Americans are out of work. Recession and inflation are eroding the money of millions more. Prices are too high and sales are too slow.

This year's Federal deficit will be about $30 billion; next year's probably $45 billion. The national debt will rise to over $600 billion.

Our plant capacity and productivity are not increasing fast enough. We depend on others for essential energy.

Some people question their government's ability to make the hard decisions and stick with them. They expect Washington politics as usual.

Yet, what President Truman said on January 5, 1949, is even more true in 1975.

We are better able to meet the peoples' needs.

All Americans do have a fairer chance to pursue happiness. Not only are we still the foremost nation in pursuit of peace, but today's prospects of attaining it are infinitely brighter.

There were 59,000,000 Americans employed at the start of 1949. Now there are more than 85,000,000 Americans who have jobs. In comparable dollars, the average income of the American family has doubled during the past 26 years.

Now, I want to speak very bluntly. I've got bad news, and I don't expect any applause. The American people want action and it will take both the Congress and the President to give them what they want. Progress and solutions can be achieved. And they will be achieved.

My message today is not intended to address all the complex needs of America. I will send separate messages making specific recommendations for domestic legislation, such as General Revenue Sharing and the extension of the Voting Rights Act.

The moment has come to move in a new direction. We can do this by fashioning a new partnership between

the Congress, the White House and the people we both represent.

Let us mobilize the most powerful and creative industrial nation that ever existed on this earth to put all our people to work. The emphasis of our economic efforts must now shift from inflation to jobs.

To bolster business and industry and to create new jobs, I propose a one-year tax reduction of $16 billion. Three-quarters would go to individuals and one-quarter to promote business investment.

This cash rebate to individuals amounts to 12 percent of 1974 tax payments—a total cut of $12 billion, with a maximum of $1,000 per return.

I call today on the Congress to act by April 1. If you do, the Treasury can send the first check for half the rebate in May and the second by September.

The other one-fourth of the cut, about $4 billion, will go to businesses, including farms, to promote expansion and create more jobs. The one-year reduction for businesses would be in the form of a liberalized investment tax credit increasing the rate to 12 percent for all businesses.

This tax cut does not include the more fundamental reforms needed in our tax system. But it points us in the right direction—allowing us as taxpayers rather than the Government to spend our pay.

Cutting taxes, now, is essential if we are to turn the economy around. A tax cut offers the best hope of creating more jobs. Unfortunately, it will increase the size of the budget deficit. Therefore, it is more important than ever that we take steps to control the growth of Federal expenditures.

Part of our trouble is that we have been self-indulgent. For decades, we have been voting ever-increasing levels of Government benefits—and now the bill has come due. We have been adding so many new programs that the size and growth of the Federal budget has taken on a life of its own.

One characteristic of these programs is that their cost increases automatically every year because the number of people eligible for most of these benefits increases

every year. When these programs are enacted, there is no dollar amount set. No one knows what they will cost. All we know is that whatever they cost last year, they will cost more next year.

It is a question of simple arithmetic. Unless we check the excessive growth of Federal expenditures or impose on ourselves matching increases in taxes, we will continue to run huge inflationary deficits in the Federal budget.

If we project the current built-in momentum of Federal spending through the next 15 years, Federal, State, and local government expenditures could easily comprise half of our gross national product. This compares with less than a third in 1975.

I am now in the process of preparing the budget submissions for fiscal year 1976. In that budget, I will propose legislation to restrain the growth of a number of existing programs. I have also concluded that no new spending programs can be initiated this year, except those for energy. Further, I will not hesitate to veto any new spending programs adopted by the Congress.

As an additional step toward putting the Federal government's house in order, I recommend a five percent limit on Federal pay increases in 1975. In all Government programs tied to the consumer price index—including social security, civil service and military retirement pay, and food stamps—I also propose a one-year maximum increase of 5 percent.

None of these recommended ceiling limitations, over which the Congress has final authority, are easy to propose, because in most cases they involve anticipated payments to many deserving people. Nonetheless, it must be done. I must emphasize that I am not asking you to eliminate, reduce or freeze these payments. I am merely recommending that we slow down the rate at which these payments increase and these programs grow.

Only a reduction in the growth in spending can keep Federal borrowing down and reduce the damage to the private sector from high interest rates. Only a reduction in spending can make it possible for the Federal

Reserve System to avoid an inflationary growth in the money supply and thus restore balance to our economy. A major reduction in the growth of Federal spending can help to dispel the uncertainty that so many feel about our economy, and put us on the way to curing our economic ills.

If we do not act to slow down the rate of increase in Federal spending, the United States Treasury will be legally obligated to spend more than $360 billion in Fiscal Year 1976—even if no new programs are enacted. These are not matters of conjecture or prediction, but again of simple arithmetic. The size of these numbers and their implications for our everyday life and the health of our economic system are shocking.

I submitted to the last Congress a list of budget deferrals and recisions. There will be more cuts recommended in the budget I will submit. Even so, the level of outlays for fiscal year 1976 is still much too high. Not only is it too high for this year but the decisions we make now inevitably have a major and growing impact on expenditure levels in future years. This is a fundamental issue we must jointly solve.

The economic disruption we and others are experiencing stems in part from the fact that the world price of petroleum has quadrupled in the last year. But we cannot put all of the blame on the oil-exporting nations. We in the United States are not blameless. Our growing dependence upon foreign sources has been adding to our vulnerability for years and we did nothing to prepare ourselves for an event such as the embargo of 1973.

During the 1960s, this country had a surplus capacity of crude oil, which we were able to make available to our trading partners whenever there was a disruption of supply. This surplus capacity enabled us to influence both supplies and prices of crude oil throughout the world. Our excess capacity neutralized any effort at establishing an effective cartel, and thus the rest of the world was assured of adequate supplies of oil at reasonable prices.

In the 1960s, our surplus capacity vanished and, as a consequence, the latent power of the oil cartel could

emerge in full force. Europe and Japan, both heavily dependent on imported oil, now struggle to keep their economies in balance. Even the United States, which is far more self-sufficient than most other industrial countries, has been put under serious pressure.

I am proposing a program which will begin to restore our country's surplus capacity in total energy. In this way, we will be able to assure ourselves reliable and adequate energy and help foster a new world energy stability for other major consuming nations.

But this Nation and, in fact, the world must face the prospect of energy difficulties between now and 1985. This program will impose burdens on all of us with the aim of reducing our consumption of energy and increasing production. Great attention has been paid to considerations of fairness and I can assure you that the burdens will not fall more harshly on those less able to bear them.

I am recommending a plan to make us invulnerable to cut-offs of foreign oil. It will require sacrifices. But it will work.

I have set the following national energy goals to assure that our future is as secure and productive as our past:

—First, we must reduce oil imports by 1 million barrels per day by the end of this year and by 2 million barrels per day by the end of 1977.
—Second, we must end vulnerability to economic disruption by foreign suppliers by 1985.
—Third, we must develop our energy technology and resources so that the United States has the ability to supply a significant share of the energy needs of the Free World by the end of this century.

To attain these objectives, we need immediate action to cut imports. Unfortunately, in the short-term there are only a limited number of actions which can increase domestic supply. I will press for all of them.

I urge quick action on legislation to allow commercial production at the Elk Hills, California, Naval Petroleum

Reserve. In order that we make greater use of domestic coal resources, I am submitting amendments to the Energy Supply and Environmental Coordination Act which will greatly increase the number of power plants that can be promptly converted to coal.

Voluntary conservation continues to be essential, but tougher programs are also needed—and needed now. Therefore, I am using Presidential powers to raise the fee on all imported crude oil and petroleum products. Crude oil fee levels will be increased $1 per barrel on February 1, by $2 per barrel on March 1 and by $3 per barrel on April 1. I will take action to reduce undue hardship on any geographical region. The foregoing are interim administrative actions. They will be rescinded when the necessary legislation is enacted.

To that end, I am requesting the Congress to act within 90 days on a more comprehensive energy tax program. It includes:

—Excise taxes and import fees totalling $2 per barrel on product imports and on all crude oil.

—Deregulation of new natural gas and enactment of a natural gas excise tax.

—Enactment of a windfall profits tax by April 1 to ensure that oil producers do not profit unduly. At the same time I plan to take Presidential initiative to decontrol the price of domestic crude oil on April 1.

The sooner Congress acts, the more effective the oil conservation program will be and the quicker the Federal revenues can be returned to our people.

I am prepared to use Presidential authority to limit imports, as necessary, to assure the success of this program.

I want you to know that before deciding on my energy conservation program, I considered rationing and higher gasoline taxes as alternatives. Neither would achieve the desired results and both would produce unacceptable inequities.

A massive program must be initiated to increase energy supply, cut demand and provide new standby emergency programs to achieve the independence we want by 1985. The largest part of increased oil production must come from new frontier areas on the Outer Continental Shelf and from the Naval Petroleum Reserve No. 4 in Alaska. It is the intention of this Administration to move ahead with exploration, leasing and production on those frontier areas of the Outer Continental Shelf where the environmental risks are acceptable.

Use of our most abundant domestic resource—coal—is severely limited. We must strike a reasonable compromise on environmental concerns with coal. I am submitting Clean Air Act amendments which will allow greater coal use without sacrificing our clean air goals.

I vetoed the strip mining legislation passed by the last Congress. With appropriate changes, I will sign a revised version into law.

I am proposing a number of actions to energize our nuclear power program. I will submit legislation to expedite nuclear licensing and the rapid selection of sites.

In recent months, utilities have cancelled or postponed over 60 percent of planned nuclear expansion and 30 percent of planned additions to non-nuclear capacity. Financing problems for that industry are growing worse. I am therefore recommending that the one year investment tax credit of 12 percent be extended an additional two years to specifically speed the construction of power plants that do not use natural gas or oil. I am also submitting proposals for selective changes in State utility commission regulations.

To provide the critical stability for our domestic energy production in the face of world price uncertainty, I will request legislation to authorize and require tariffs, import quotas or price floors to protect our energy prices at levels which will achieve energy independence.

Increasing energy supplies is not enough. We must also take additional steps to cut long-term consumption. I therefore propose:

—Legislation to make thermal efficiency standards mandatory for all new buildings in the United States. These standards would be set after appropriate consultation with architects, builders and labor.
—A new tax credit of up to $150 for those home owners who install insulation equipment.
—The establishment of an energy conservation program to help low income families purchase insulation supplies.
—Legislation to modify and defer automotive pollution standards for 5 years to enable us to improve new automobile gas mileage 40 percent by 1980.

These proposals and actions, cumulatively, can reduce our dependence on foreign energy supplies to 3-5 million barrels per day by 1985. To make the United States invulnerable to foreign disruption, I propose standby emergency legislation and a strategic storage program of 1 billion barrels of oil for domestic needs and 300 million barrels for defense purposes.

I will ask for the funds needed for energy research and development activities. I have established a goal of 1 million barrels of synthetic fuels and shale oil production per day by 1985 together with an incentive program to achieve it.

I believe in America's capabilities. Within the next ten years, my program envisions:

—200 major nuclear power plants,
—250 major new coal mines,
—150 major coal-fired power plants,
—30 major new oil refineries,
—20 major new synthetic fuel plants,
—the drilling of many thousands of new oil wells,
—the insulation of 18 million homes,
—and construction of millions of new automobiles, trucks and buses that use much less fuel.

We can do it. In another crisis—the one in 1942—President Franklin D. Roosevelt said this country would build 60,000 aircraft. By 1943, production had reached 125,000 airplanes annually.

If the Congress and the American people will work with me to attain these targets, they will be achieved and surpassed.

From adversity, let us seize opportunity. Revenues of some $30 billion from higher energy taxes designed to encourage conservation must be refunded to the American people in a manner which corrects distortions in our tax system wrought by inflation.

People have been pushed into higher tax brackets by inflation with a consequent reduction in their actual spending power. Business taxes are similarly distorted because inflation exaggerates reported profits resulting in excessive taxes.

Accordingly, I propose that future individual income taxes be reduced by $16.5 billion. This will be done by raising the low income allowance and reducing tax rates. This continuing tax cut will primarily benefit lower and middle income taxpayers.

For example, a typical family of four with a gross income of $5,600 now pays $185 in Federal income taxes. Under this tax cut plan, they would pay nothing. A family of four with a gross income of $12,500 now pays $1,260 in Federal taxes. My plan reduces that by $300. Families grossing $20,000 would receive a reduction of $210.

Those with the very lowest incomes, who can least afford higher costs, must also be compensated. I propose a payment of $80 to every person 18 years of age and older in that category.

State and local governments will receive $2 billion in additional revenue sharing to offset their increased energy costs.

To offset inflationary distortions and to generate more economic activity, the corporate tax rate will be reduced from 48 percent to 42 percent.

Now, let me turn to the international dimension of the present crisis. At no time in our peacetime history has the state of the Nation depended more heavily on the state of the world. And seldom if ever has the state of the world depended more heavily on the state of our Nation.

The economic distress is global. We will not solve it at home unless we help to remedy the profound economic dislocation abroad. World trade and monetary structure provides markets, energy, food and vital raw materials—for all nations. This international system is now in jeopardy.

This Nation can be proud of significant achievements in recent years in solving problems and crises. The Berlin Agreement, the SALT agreements, our new relationship with China, the unprecedented efforts in the Middle East—are immensely encouraging. But the world is not free from crisis. In a world of 150 nations, where nuclear technology is proliferating and regional conflicts continue, international security cannot be taken for granted.

So let there be no mistake about it: international cooperation is a vital fact of our lives today. This is not a moment for the American people to turn inward. More than ever before, our own well-being depends on America's determination and leadership in the world.

We are a great Nation—spiritually, politically, militarily, diplomatically and economically. America's commitment to international security has sustained the safety of allies and friends in many areas—in the Middle East, in Europe, in Asia. Our turning away would unleash new instabilities and dangers around the globe which would, in turn, threaten our own security.

At the end of World War II, we turned a similar challenge into an historic achievement. An old order was in disarray; political and economic institutions were shattered. In that period, this Nation and its partners built new institutions, new mechanisms of mutual support and cooperation. Today, as then, we face an historic opportunity. If we act, imaginatively and boldly, as we acted then, this period will in retrospect be seen as one of the great creative moments of our history.

The whole world is watching to see how we respond.

A resurgent American economy would do more to restore the confidence of the world in its own future than anything else we can do. The program that this Con-

gress will pass can demonstrate to the world that we have started to put our own house in order. It can show that this Nation is able and willing to help other nations meet the common challenge. It can demonstrate that the United States will fulfill its responsibility as a leader among nations.

At stake is the future of the industrialized democracies, which have perceived their destiny in common and sustained it in common for 30 years.

The developing nations are also at a turning point. The poorest nations see their hopes of feeding their hungry and developing their societies shattered by the economic crisis. The long-term economic future for the producers of raw materials also depends on cooperative solutions.

Our relations with the Communist countries are a basic factor of the world environment. We must seek to build a long-term basis for coexistence. We will stand by our principles and our interests; we will act firmly when challenged. The kind of world we want depends on a broad policy of creating mutual incentives for restraint and for cooperation.

As we move forward to meet our global challenges and opportunities, we must have the tools to do the job.

Our military forces are strong and ready. This military strength deters aggression against our allies, stabilizes our relations with former adversaries and protects our homeland. Fully adequate conventional and strategic forces cost many billions, but these dollars are sound insurance for our safety and a more peaceful world.

Military strength alone is not sufficient. Effective diplomacy is also essential in preventing conflict and building world understanding. The Vladivostok negotiations with the Soviet Union represent a major step in moderating strategic arms competition. My recent discussions with leaders of the Atlantic Community, Japan and South Korea have contributed to our meeting the common challenge.

But we have serious problems before us that require cooperation between the President and the Congress. By

the Constitution and tradition, the execution of foreign policy is the responsibility of the President.

In recent years, under the stress of the Vietnam War, legislative restrictions on the President's capability to execute foreign and military decisions have proliferated. As a member of the Congress, I opposed some and approved others. As President, I welcome the advice and cooperation of the House and Senate.

But, if our foreign policy is to be successful we cannot rigidly restrict in legislation the ability of the President to act. The conduct of negotiations is ill suited to such limitations. For my part, I pledge this Administration will act in the closest consultations with the Congress as we face delicate situations and troubled times throughout the globe.

When I became President only five months ago, I promised the last Congress a policy of communication, conciliation, compromise and cooperation. I renew that pledge to the new members of this Congress.

To sum up:

America needs a new direction which I have sought to chart here today—a change of course which will:

—put the unemployed back to work;
—increase real income and production;
—restrain the growth of government spending;
—achieve energy independence; and
—advance the cause of world understanding.

We have the ability. We have the know-how. In partnership with the American people, we will achieve these objectives.

As our 200th anniversary approaches, we owe it to ourselves, and to posterity, to rebuild our political and economic strength. Let us make America, once again, and for centuries more to come, what it has so long been—a stronghold and beacon-light of liberty for the world.

GERALD R. FORD

THE WHITE HOUSE,

January 15, 1975.

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Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

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The President's Economic and Tax Program

The President's State of the Union Address outlined the nation's current economic situation and outlook, and his economic and tax program which are designed to wage a simultaneous three-front campaign against recession, inflation and energy dependence.

BACKGROUND

The U.S. economy is faced with the closely linked problems of inflation and recession. During 1974, the economy experienced the highest rate of inflation since World War II. Late in 1974, when a recession set in, unemployment rose sharply to over 7 percent, the highest level in 13 years.

Accelerated inflation had its roots in the policies of the past and several recent developments not subject to U.S. control. Specifically:

—Excessive Federal spending and lending for over a decade and too much money and credit growth.
—Unusually poor harvests contributed heavily to world-wide food shortages and escalating food prices.
—World petroleum product prices increased dramatically due to the Arab nations' embargo on shipments of oil to the U.S., the quadrupling of the price of crude oil by the OPEC nations, and their sharp reductions in crude oil production to maintain higher prices. Higher energy prices were passed through in the prices of other products and services.
—The decline in U.S. domestic production of oil and natural gas that began in the 1960's also contributed to higher energy prices.
—An economic boom occurred simultaneously in the industrialized nations of the world.
—There were two international devaluations of the dollar.

Inflation contributed strongly to the forces of recession:

—The real purchasing power of workers' paychecks was reduced.

—Inflation also reduced consumer confidence, contributing to the most severe slump in consumer purchasing since World War II.
—Inflation forced interest rates to very high levels, draining funds out of financial institutions that supply most mortgage loans and thus sharply reducing construction of homes.
—Federal Government spending and lending programs, accounting for over half the funds raised in capital markets, reduced the amount of money available for capital investments needed to raise productivity and increase living standards.

CURRENT SITUATION AND NEAR-TERM OUTLOOK

The economy is now in a full-fledged recession and unemployment will rise further. Inflation continues at a rapid pace and the need to take immediate steps to conserve energy will further complicate the problem initially.

There are no instant cures. A careful and balanced policy approach is required. It will take time to yield full results. There is, however, no prospect of a long and deep economic downturn on the scale of the 1930's.

MAJOR ELEMENTS OF THE PRESIDENT'S ECONOMIC AND TAX PROGRAM

I. *A $16 Billion Temporary, Anti-Recession Tax Reduction.* This major reduction in taxes proposed for individuals and businesses is designed to restore consumer confidence and promote a recovery of production and employment. The recession is deeper and more widespread than expected earlier, but the tax reduction—together with the easing of monetary conditions that has already taken place—will support a healthy economic recovery. The tax reduction must be temporary to avoid excessive stimulus resulting in a new price explosion and congested capital markets. The temporary nature of the reduction is consistent with the long-term economic goals of achieving and maintaining reasonable price stability and raising the share of national output devoted to saving and capital formation.

II. *Energy Taxes and Fees.* Energy excise taxes and fees on petroleum and natural gas will reduce use of these energy sources and reduce the nation's need for importing expensive and insecure foreign oil. Removal of price controls from domestic crude oil (together with other energy actions) will encourage domestic oil production. A windfall profits tax would recover windfall profits resulting from crude oil decontrol. Energy taxes and fees are expected to raise $30 billion in new Federal revenues on an annual basis.

III. *Permanent Tax Reduction Made Possible By Energy Taxes and Fees.* The $30 billion annual revenue from energy conservation excise taxes and fees and the windfall profits tax on crude oil would be returned to the economy through a major tax cut, a cash payment for non-taxpayers, and direct distribution to governmental units. Tax reductions are designed to go mainly to low- and middle-income taxpayers.

IV. *One Year Moratorium on New Federal Spending Programs.* The moratorium on new spending programs proposed by the President will permit the Federal Government to move toward long-term budget responsibility and to avoid refueling inflation when the economy begins rising again.

V. *Budget Reductions.* The President will propose significant spending reductions in his Fiscal Year 1976 Budget. The reductions total more than $17 billion, including $7.8 billion savings from reductions proposed last year and $6.1 billion from the 5 percent ceiling to be proposed on Federal employee pay increases and on Federal benefit programs that rise automatically with the Consumer Price Index.

SPECIFIC PROPOSALS ANNOUNCED BY THE PRESIDENT

I. *A Temporary, Anti-Recession Tax Cut of $16 Billion.* The President proposed a temporary, tax reduction of approximately $16 billion to provide prompt stimulus to consumer spending and business investment. The tax cut is divided 75 percent to individuals and 25 percent to corporations, which is approximately the ratio that individual income taxes bear to corporate income taxes. The cuts would be:

A. *A Tax Reduction for Individuals of $12 Billion.*

1. Individuals will receive a cash refund equal to 12 percent of their 1974 tax liabilities, as reported on their 1974 tax returns now being filed, up to a limit of $1,000. Married couples filing separately would receive a maximum refund of $500 each.

2. The temporary reduction will be a uniform 12 percent for all taxpayers up to about the $41,000 income level where the $1,000 maximum takes effect, and will then be a progressively smaller percentage for taxpayers above that level.

3. The refund will be paid in two equal installments in 1975 with payments of the first installment beginning in May and the second in September.

4. The proposal does not affect in any way the manner in which taxpayers complete and file their 1974 tax returns. They will file and pay their tax in accordance with existing law, without regard to the tax reduction. Later they will receive their refund checks from the Internal Revenue Service. Because no changes in deductions and other such items are involved, the Internal Revenue Service will be able to determine the amount of the refund and mail the

checks without requiring further forms and computations from taxpayers.

5. The effect of the tax refund can be illustrated for a family of four as follows:

Adjusted Gross Income	Present Tax	Proposed Refund	Percent Saving
$ 5,000	$ 98	$ 12	−12.0%
7,000	402	48	−12.0%
10,000	867	104	−12.0%
12,500	1,261	151	−12.0%
15,000	1,699	204	−12.0%
20,000	2,660	319	−12.0%
40,000	7,958	955	−12.0%
50,000	11,465	1,000	− 8.7%
60,000	15,460	1,000	− 6.5%
100,000	33,340	1,000	− 3.0%
200,000	85,620	1,000	− 1.2%

Although the taxpayer will not figure his own refund, it is a simple matter for him to anticipate how much the Internal Revenue Service will be sending him, by calculating 12 percent of his total tax liability for the year (on Form 1040 for 1974, it is line 18, page 1, and on Form 1040A, line 19).

B. *A Temporary Increase in Investment Tax Credit for Business and Farmers of $4 billion.*

1. There will be an increase for one year in the investment tax credit to 12 percent for all taxpayers, including utilities (which presently have, in effect, a 4 percent credit). Utilities will continue to receive a 12 percent credit for two additional years for qualified investment in electrical power plants other than oil- or gas-fired facilities.

2. This increase in the credit will provide benefits of $4 billion in 1975 to immediately stimu-

late job-creating investment. (In view of the need for speedy enactment and the temporary nature of the increased credit, this change does not include the basic restructuring of the credit as proposed on a permanent basis in October, 1974.)

3. With respect to utilities, it includes a temporary increase in the amount of credit which may be used to offset income tax. Under current law, not more than 50 percent of the income tax liability for the year may be offset by the investment credit. Since many utilities have credits they have been unable to use because of this limitation, under this proposal utilities will be permitted to use the credit to offset up to 75 percent of their tax liability for 1975, 70 per cent for 1976, 65 percent for 1977 and so on, until 1980, when they will in five annual steps have returned to the 50 percent limitation applicable to industry generally.

4. The 12 percent credit will apply to property placed in service during 1975 and to property ordered during 1975 if placed in service before the end of 1976. The credit will also be available to the extent of construction, reconstruction or erection of property by or for a taxpayer during 1975, without regard to the date ultimately placed in service. Similar rules will apply to investment in electrical power plants other than oil- or gas-fired facilities for which the 12 percent credit will continue through 1977.

II. *Energy Conservation Taxes and Fees.* Energy taxes and fees, in conjunction with domestic crude oil price decontrol and the proposed windfall profits tax, would raise about $30 billion on an annual basis. The fees and taxes and related actions (discussed more fully in Part Two of this Fact Sheet) include:

A. *Administrative Actions.*

1. *Import Fee*—The President is acting immediately within existing authorities to increase import fees on crude oil and petroleum products. These new import fees will be modified upon passage of the President's legislative package.

(a) Import fees on crude oil and petroleum products will be increased by $1 effective February 1, 1975; an additional $1 effective March 1; and another $1 effective April 1, for a total increase of $3.00 per barrel. Currently existing fees will also remain in effect.

(b) FEA's "Old Oil Entitlements" program will utilized to spread price increases on crude among all refiners, and to lessen disproportionate regional effects, such as New England, or in any specific industries or areas of human need where oil is essential.

(c) As of February 1975, product imports will cease to be covered by FEA's "Old Oil Entitlements" program. In order to overcome any severe regional impacts that could be caused by large fees in import dependent areas, imported products will receive a fee rebate corresponding to the benefit which would have been obtained under that program. The rebate should be approximately $1.00 in February, $1.40 in March, and $1.80 per barrel thereafter.

(d) The import fee program will reduce imports by an estimated 500,000 barrels per day and generate about $400 million per month in revenues by April.

2. *Crude Oil Price Decontrol*—To stimulate domestic production and further cut demand, steps will be taken to remove price controls on domestic crude oil by April 1, 1975, subject to congressional disapproval as provided by § 4(g) of

the Emergency Petroleum Allocation Act of 1973.

3. *Control of Imports*—The energy conservation measures to be imposed administratively outlined above, the energy conservation taxes outlined below and other energy conservation measures covered in Part Two below, will be supplemented by the use of Presidential power to limit oil imports as necessary to fully achieve the President's goals of reducing foreign oil imports by one million barrels a day by the end of 1975 and by two million barrels before the end of 1977.

B. *Taxes Proposed to the Congress.* The President asked the Congress to pass within 90 days a comprehensive energy conservation tax program which will raise an estimated $30 billion in revenues on an annual basis. The taxes proposed are:

1. *Petroleum Excise Tax and Import Fee*—An excise tax on all domestic crude oil of $2 per barrel and a fee on imported crude oil and product imports of $2 per barrel.

2. *Natural Gas Excise Tax*—An excise tax on natural gas of 37¢ per thousand cubic feet (mcf), the equivalent on a Btu basis to the $2 per barrel petroleum excise tax and import fee.

3. *Windfall Profits Tax*—To ensure that the end of controls on crude oil prices does not result in one sector of the economy benefitting unfairly at the expense of other sectors, a windfall profits tax will be levied on the profits realized by producers of domestic oil. This tax is intended to recapture excessive profits which would otherwise be realized by producers as a result of the rise in international oil prices. This tax does not itself cause price increases, but simply recaptures the profits from price increases otherwise

induced. It will, together with the income tax on such profits, produce revenues of approximately $12 billion. In aggregate, the windfall profits tax is sufficient to absorb all the profits that would otherwise flow from decontrolling oil prices, plus an additional $3 billion. More specifically the tax will operate as follows:

(a) A windfall profits tax at rates graduated from 15 percent to 90 percent will be imposed on that portion of the price per barrel that exceeds the producer's adjusted base price and therefore represents a windfall profit. The initial "adjusted base price" will be the producer's ceiling price per barrel on December 1, 1973 plus 95 cents to adjust for subsequent increased costs and higher price levels generally. Each month the bases will be adjusted upward on a specified schedule, which will gradually raise the adjusted base price to reflect long-run supply conditions and provide the incentive for new investment in petroleum exploration. Percentage depletion will not be allowed on the windfall profits tax liability.

(b) The windfall profits tax rates will be applied to prices per barrel in excess of applicable adjusted base prices as follows:

Portion of price per barrel in excess of base and subject to tax	Amount of tax
Less than $0.20	15% of amount within bracket
$0.20, under $0.50	$0.03 plus 30% of amount within bracket
$0.50, under $1.20	$0.12 plus 60% of amount within bracket
$1.20, under $3.00	$0.54 plus 80% of amount within bracket
$3.00 and over	$1.98 plus 90% of amount within bracket

(c) The windfall profits tax does not include a "plowback" provision, nor does it contain exemptions for classes of production or producers. It does, however, include the limitation that the amount subject to tax may not exceed 75 percent of the net income from the barrel of crude oil. The tax will be retroactive to January 1, 1975.

(d) The windfall profits tax reduces the base for the depletion allowance.

III. *Permanent Tax Reductions and Payments to Non-Taxpayers Made Possible by Energy Conservation Taxes.*

Of the $30 billion in revenue raised annually by the proposed conservation taxes outlined above, about $5 billion is paid by governments through the higher costs of energy in their purchases. This $5 billion includes:

$3 billion by the Federal government.
$2 billion by state and local governments.

The President is proposing to the Congress that $2 billion of the revenues be paid to State and local governments, pursuant to the distribution formulas applicable to general revenue sharing. The other $25 billion will be returned to the economy mostly in the form of tax cuts. As in the case of the temporary tax reduction, this permanent change will be divided between individuals and corporations on a 75-25 percent basis, about $19 billion for individuals and about $6 billion for corporations. Specifically, this would include:

A. *Reductions for Individuals in 1975*—Tax cuts for individuals will be achieved in two ways. (1) through an increase in Low Income Allowance and (2) a cut in the schedule of tax rates. In this way, tax-paying individuals will receive a reduction of approximately $16½ billion, with proportionately larger cuts going to low- and

middle-income families. The Low Income Allowance will be increased from the present $1,300 level to $2,600 for joint returns and $2,000 for single returns. That will bring the level at which returns are nontaxable to what is approximately the current "poverty level" of $5,600 for a family of 4. In addition, the tax rates applicable to various brackets of income will be reduced. The aggregate effects of these changes are as follows:

(1975 Levels)
($billions)

Adjusted Gross Income Class	Income Tax Paid Under Present Law	Amout of Income Tax Reduction	Percentage Reduction in Income Tax
($000)			(%)
0- 3	3	— .25	—83.3%
3- 5	1.8	— 1.20	—66.7
5- 7	4.0	— 1.96	—49.0
7- 10	8.9	— 3.38	—38.0
10- 15	21.9	— 4.72	—21.6
15- 20	22.8	— 2.70	—11.8
20- 50	44.4	— 2.15	— 4.8
50-100	13.5	— .11	— 0.8
100 and over	13.3	— .03	— 0.2
Total	130.9	—16.50*	—12.6

* Does not include payments to nontaxpayers

The effect of these tax changes can be illustrated for a family of 4, as follows:

Adjusted Gross Income	Present Tax [1]	New Tax	Tax Saving	Percent Saving
$ 5,600	$ 185	$ 0	$185	100.0%
7,000	402	110	292	72.6
10,000	867	518	349	40.3
12,500	1,261	961	300	23.8
15,000	1,699	1,478	221	13.0
20,000	2,668	2,450	210	7.9
30,000	4,988	4,837	151	3.0
40,000	7,958	7,828	130	1.6

[1] Calculated assuming Low Income Allowance or itemized deductions equal to 17 percent of income, whichever is greater.

B. *Residential Conservation Tax Credit* (Discussed in the Energy Section of this Fact Sheet). The President seeks legislation to provide incentives to homeowners for making thermal efficiency improvements, such as storm windows and insulation, in existing homes. This measure, along with a stepped-up public information program, could save the equivalent of over 500,000 barrels of oil per day by 1985. Under this legislation:

1. A 15 percent tax credit retroactive to January 1, 1975 for the cost of certain improvements in thermal efficiency in residences would be provided. Tax credits would apply to the first $1,000 of expenditures and can be claimed during the next three years.

2. At least 18 million homes could qualify for these tax benefits, estimated to total about $500 million annually in tax credits.

C. *Payments to Nontaxpayers of $2 billion.* The final component of the $19 billion distribution to individuals is a distribution of nearly $2 billion to nontaxpayers and certain low-income taxpayers. For this low-income group, a special

distribution of $80 per adult will be provided, as follows:

1. Adults who would pay no tax, even without the tax reductions in A above, will receive $80.

2. Adults who receive less than $80 in such tax reductions will receive approximately the difference.

3. Persons not otherwise filing returns but eligible for these special distributions will make application on simple forms provided by the Internal Revenue Service on which they would furnish their name, address, social security number, and income.

4. For purposes of the special distribution, "adults" are individuals who during the year are at least 18 years old and who are not eligible to be claimed as a dependent under the Federal income tax laws.

5. Since most taxpayers will receive their 1975 income tax reductions in 1975 through reductions in withholding on wages and estimated tax payments, the special distribution to nontaxpayers and low-income taxpayers will also begin in 1975. It is anticipated that disbursement, based on 1974 income can be made in the summer of 1975.

D. *Tax Reductions for Corporations.* The corporate rate will be reduced by 6 percentage points, effectively lowering the corporate rate from 48 percent to 42 percent for 1975. The resulting benefit in 1975 is estimated at about $6 billion.

IV. *Moratorium on New Federal Spending Programs.*

The President announced that he would propose no new Federal spending programs except for energy. He also indicated that he would not hesitate to veto any new spending programs passed by the Congress.

The need for the moratorium is demonstrated by preliminary FY 1976 Budget estimates:

	Fiscal Years			Percent Change	
	1974	1975	1976	75/74	76/75
Revenues	264.9	280	303	5.7%	8.2%
Outlays	268.4	314	349	17 %	11.1%
Deficit	3.5	32-34	45-47	—	—

NOTE: Estimates for 1975 and 1976 are subject to a variation of $2 billion in the final budget.

V. *Budget Reductions.*

The budget figures shown above assume that significant budget reductions proposed by the President are effected. Including reductions proposed in a series of special messages sent to the last session of Congress these budget reductions total more than $17 billion. Of this total, over $6 billion will result from the proposed 5% ceiling on Federal pay increases and on those Federal benefit programs that rise automatically with the Consumer Price Index.

The following summarizes reductions in 1976 spending to be included in the upcoming budget:

	(Outlays in billions)
Effect of budget reductions proposed last year (including administrative actions)	$8.9
Amounts overturned by the Congress	−1.1
Remaining savings	7.8
Further reductions to be proposed:	
Ceiling of 5% on Federal pay and programs tied to the CPI	6.1
Other actions planned	3.6
Total reductions	17.5

The following lists those programs to which the 5% ceiling will apply and shows spending amounts for them:

Effect of 5% Ceiling on Pay Increases and Programs Tied to CPI

(Fiscal year estimates; Dollars in billions)

Programs Affected	1975 Outlays	1976 Outlays		Difference 1975-1976 (with ceiling)
		Without ceiling	With ceiling	
Social security	64.5	74.3	71.8	+7.3
Railroad retirement	3.0	3.4	3.3	+0.3
Supplemental Security Income	4.7	5.5	5.4	+0.7
Civil service and military retirement payments	13.5	16.2	14.9	+1.4
Foreign Service retirement	.1	.1	.1	*
Food stamp program	3.7	3.9	3.6	−0.1
Child nutrition	1.3	1.8	1.6	+0.3
Federal salaries:				
Military	23.2	23.1	22.5	−0.7
Civilian	35.5	38.9	38.0	+2.5
Coal miner benefits	1.0	1.0	1.0	*
Total	150.5	168.2	162.1	+11.7

*Less than $50 million.

The 5% ceiling will take into account increases that have already occurred since January 1, 1975. Under the plan, after June 30, 1976, adjustments would be resumed in the same way as before the establishment of the 5% ceiling. However, no catchup of the increases lost under the ceiling would take place.

SUMMARY OF THE BUDGET IMPACT OF THE NEW TAXES AND FEES AND THE TAX CUTS

The following table summarizes the estimated direct budget impact, on a full-year-effective basis, of the tax and related changes proposed by the President to deal with the economic and energy situations:

Revenue Raising Measures	Estimated Amounts ($ billions)
Oil excise tax and import fee	+ 9½
Natural gas excise tax	+ 8½
Windfall Profits tax	+12
Total	**+30**
Revenue Disbursing Measures	
Energy rebates:	
Income tax cuts, individuals	−16½
Residential tax credit	− ½
Nontaxpayer distribution	− 2
Corporate tax cut	− 6
State and local governments	− 2
Federal government costs	− 3
Subtotal	**−30**
Temporary economic stimulus:	
Individual tax refunds	−12
Investment credit increase	− 4
Subtotal	−16
Total Revenue Disbursing Measures	46

The tax and related changes will go into effect at different times, but all of them during the year 1975:

—The energy conservation taxes are proposed to go into effect April 1.
—The increase in import fees would go into effect
  —$1 per barrel February 1.
  —To $2 per barrel March 1.

  —To $3 per barrel, if the energy taxes have not been enacted, April 1.

—The windfall profits tax on crude oil would be effective as of January 1, 1975. First payments of the tax would be made in the third quarter.
—The permanent tax cuts for individuals and corporations made possible by the revenues from the energy conservation taxes would be effective as of January 1, 1975. The changes in withholding rates for individuals are expected to go into effect on June 1. The withholding changes will be adjusted so that 12 months reduction is accomplished in the 7 months from June through December.
—The tax credit for energy-saving improvements to existing residences would go into effect as of January 1, 1975.
—The special distribution to nontaxpayers is expected to be paid out in the summer of 1975.
—The $2 billion distribution to State and local governments would be effective with the second quarter of 1975.
—The temporary anti-recession tax cut for individuals will be paid out in two installments, in the second and third quarters.
—The one-year increase in the investment tax credit becomes effective retroactively to January 1, 1975.

The timing of the various changes suggests a pattern of direct budget changes as follows. The timing of the economic stimulus or restraint will depend, as well on such factors as the indirect effects of the budget changes, the timing of the pass-through of higher energy costs to final users, the extent to which the changes are anticipated, and a variety of monetary and financial developments that arise out of these changes.

Timing of Direct Budget Impact
($ billions)

Calendar Years

	1975				1976			
	I	II	III	IV	I	II	III	IV
Energy Taxes	+0.2	+4.1	+12.6	+7.6	+7.6	+7.5	+7.5	+7.5
Return of Energy Revenues to Economy Tax Reduction	.0	—3.2	— 9.0	—9.0	—5.6	—7.9	—6.3	—6.4
Nontaxpayers			— 2.0				—2.0	
S&L Gov'ts	.0	—0.5	— 0.5	—0.5	—0.5	—0.5	—0.5	—0.5
Federal Govt.	.0	.0	— 0.8	—0.7	—0.8	—0.7	—0.8	—0.7
Temporary Tax Cut	.0	—6.1	— 7.9	—0.6	—0.8	—0.9	0	0
Net Effect	+0.2	—5.7	— 7.6	—3.2	—0.1	—2.5	—2.1	—0.1

INFLATION IMPACT

Both major parts of the tax package require inflation impact analysis. The excise taxes on crude oil and natural gas, combined with the tariff and decontrol of prices of both "old" oil and new natural gas, will add to the general price level immediately. The consumer price index is expected to rise by about two percent when these tax and price increases go into effect. However, this increase has a one-time impact on the price level that, with exceptions in some areas, should not add materially to inflationary pressures in future years.

The inflationary impact of the $16 billion anti-recession tax cut is more difficult to assess. While some economists may argue that a tax cut will add to the rate of inflation during the year ahead, others would contend that under present economic conditions, with unemployment high and many factories operating well below capacity, the predominant effect of the tax cut will be to stimulate spending, and that additional spending will have only a slight impact on prices.

Whatever the precise price impact of this $16 billion tax cut during 1975, the most important fact about it from the standpoint of inflation is that it is temporary. With the recession still under way, the rate of inflation will be coming down—it will be too high, but nevertheless moving in the right direction. After the economy gets well into recovery, however, too much stimulus would be sure to reverse the slowing of the inflation rate and, indeed, start a new acceleration. Thus, the tax stimulus must be temporary rather than permanent.

The President has declared a moratorium on new Federal spending programs for this same reason. Budget expenditures are rising rapidly this year, in part, because of programs to aid the unemployed. That is acceptable and highly desirable in a recession to relieve the burden on workers who are affected. It is also desirable because spending under those programs phases out as the economy

recovers and unemployment falls. The increased Federal spending is only temporary.

Over the long-term, however, both Federal spending and lending have been rising much too fast, a fact that accounts for a substantial part of our current economic problems. A new burst of expenditure programs cannot help the Nation recover from the current recession—the impact would come too late—but it would surely do much inflationary harm as the economy returns to prosperous conditions in the years ahead. Therefore, at the same time that taxes are being reduced to support a healthy recovery, policies that would revise inflationary pressures must be avoided after the recovery is underway. The size of currently projected Federal budget deficits precludes introduction of new spending programs now that would raise inflationary pressures later. For this reason, the President requested that no new spending programs, except as needed in the energy area, be enacted so that we can regain control of the budget over the long-run and permit a gradual return to reasonable price stability.

PRESIDENTIAL PROPOSALS OF OCTOBER 8, 1974 RESUBMITTED FOR CONGRESSIONAL ACTION

In addition to the comprehensive set of economic and energy policies discussed in the State of the Union Message, the President asked that the new Congress pass quickly certain legislative proposals originally requested in his October 8, 1974, message. Those proposals would:

1. Remove restrictions on the production of rice, peanuts, and extra-long-staple cotton.
2. Amend P.L. 480 to waive certain restrictions on shipments of food under that Act to needy countries for national interest or humanitarian reasons.
3. Amend the Antitrust Civil Process Act to strengthen the investigation powers of the Antitrust Division of the Department of Justice.

4. Eliminate the U.S. Withholding tax on foreign portfolio investments to encourage such investment.
5. Allow dividends paid on qualified preferred stock to be an authorized deduction for determining corporate income taxes to increase incentives for raising needed capital in the form of equity rather than debt.
6. Create a National Commission on Regulatory Reform and take prompt action on other reforms of regulatory and administrative procedures that will be recommended in the future.
7. Strengthen our financial institutions and provide a new tax incentive for investment in residential mortgages.
8. Permit more competition between different modes of surface transportation (The Surface Transportation Act).
9. Amend the Employment Act of 1946 to make explicit the goal of price stability. (Substitute "to promote maximum employment, maximum production, and stability of the general price level" in place of the present language, "to promote maximum employment, production and purchasing power.")

The President's Energy Program (including energy taxes and fees)

The President's State of the Union Address outlined the Nation's energy outlook, set forth national energy policy objectives, and described actions he is taking immediately and indicated proposals he is asking the Congress to pass.

BACKGROUND

Over the past two years, progress has been made in conserving energy, expanding energy R&D and improving Federal government energy organization. Despite

such accomplishments, we have not succeeded in solving fundamental problems and our National energy situation is critical. Our reliance on foreign sources of petroleum is contributing to both inflationary and recessionary pressures in the United States. World economic stability is threatened and several industrialized nations dependent upon imported oil are facing severe economic disruption.

With respect to the U.S. energy situation:

—Petroleum is readily available from foreign sources —but at arbitrarily high prices, causing massive outflow of dollars, and at the risk of increasing our Nation's vulnerability to severe economic disruption should another embargo be imposed.

—Petroleum imports remain at high levels even at present high prices.

—Domestic oil production continues to decline as older fields are depleted and new fields are years from production; 8.8 million barrels per day in 1974 compared to 9.2 million in 1973.

—Total U.S. petroleum consumption is increasing, although at slower rates due to higher prices.

—Natural gas shortages are forcing curtailment of supplies to many industrial firms and denial of service to new residential customers. (14% expected this winter versus 7% last year.) This is resulting in unemployment, reductions in the production of fertilizer needed to increase food supplies, and increased demand for alternative fuels—primarily imported oil.

—Coal production is at about the same level as in the 1930's.

—Nuclear energy accounts for only 1 percent of total energy supply and new plants are being delayed, postponed or cancelled.

—Overall energy consumption is beginning to increase again.

—U.S. vulnerability to economic and social impact from an embargo increases with higher imports and will continue to do so until we reverse current trends, ready standby plans, and increase petroleum storage.

Economic impacts of the four-fold increase in OPEC oil prices include:

—Heavy outflow of U.S. dollars (and, in effect, jobs) to pay for growing oil imports—about $24 billion in 1974 compared to $2.7 billion in 1970.

—Tremendous balance of payments deficits and possible economic collapse for those nations of Europe and Asia that must depend upon expensive imported oil as a primary energy source.

—Accumulation of billions of dollars of surplus revenues in oil exporting nations—approximately $60 billion in 1974 alone.

U.S. ENERGY OUTLOOK

I. *Near-Term* (1975-1977): In the next 2-3 years there are only a few steps that can be taken to increase domestic energy supply particularly due to the long lead time for new production. Oil imports will thus continue to rise unless demand is curbed.

II. *Mid-Term* (1975-1985): In the next ten years, there is greater flexibility. A number of actions can be taken to increase domestic supply, convert from foreign oil to domestic coal and nuclear energy, and reduce demand—if the Nation takes tough actions. Vulnerability to an embargo can be eliminated.

III. *Long-Term* (Beyond 1985): Emerging energy sources can play a bigger role in supplying U.S. needs—the results of the Nation's expanded energy research and development program. U.S. independence can be maintained. New technologies are the most significant opportunity for other consuming nations with limited domestic resources.

NATIONAL ENERGY POLICY GOALS AND PRINCIPLES ANNOUNCED BY THE PRESIDENT

I. *Near-Term* (1975-1977): Reduce oil imports by 1 million barrels per day by the end of 1975 and 2 million barrels by the end of 1977, through immediate actions to reduce energy demand and increase domestic supply.

(A) With no action, imports would be about 8 million barrels per day by the end of 1977, more than 20 percent above the 1973 pre-embargo levels.

(B) Acting to meet the 1977 goal will reduce imports below 1973 levels, assuring reduced vulnerability from an embargo and greater consumer nation cooperation.

(C) More drastic short-term reductions would have unacceptable economic impacts.

II. *Mid-Term* (1975-1985): Eliminate vulnerability by achieving the capacity for full energy independence by 1985. This means 1985 imports of no more than 3-5 million barrels of oil per day, all of which can be replaced immediately from a strategic storage system and managed with emergency measures.

(A) With no action, oil imports by 1985 could be reduced to zero at prices of $11 per barrel or more—or they could go substantially higher if world oil prices are reduced (e.g., at $7 per barrel, U.S. consumption could reach 24 million barrels per day with imports of above 12 million, or above 50% of the total.)

(B) The U.S. anticipates a reduction in world oil prices over the next several years. Hence, plans and policies must be established to achieve energy independence even at lower prices—countering the normal tendency to increase imports as the price declines.

(C) Actions to meet the 1985 goal will hold imports to no more than 3-5 million barrels per day even at $7 per barrel prices. Protection against an embargo of the remaining imports can then be handled most economically with storage and standby emergency measures.

III. *Long-Term* (Beyond 1985): Within this century, the U.S. should strive to develop technology and energy resources to enable it to supply a significant share of the Free World's energy needs.

(A) Other consuming nations have insufficient fossil fuel resources to reach domestic energy self-sufficiency.

(B) The U.S. can again become a world energy supplier and foster world energy price stability—much the same as the nation did prior to the 1960's when it was a major supplier of world oil.

IV. *Principles*: Actions to achieve the above national energy goals must be based upon the following principles:

—Provide energy to the American consumer at the lowest possible cost consistent with our need for secure energy supplies.
—Make energy decisions consistent with our overall economic goals.
—Balance environmental goals with energy requirements.
—Rely upon the private sector and market forces as the most efficient means of achieving the Nation's goals, but act through the government where the private sector is unable to achieve our goals.
—Seek equity among all our citizens in sharing of benefits and costs of our energy program.
—Coordinate our energy policies with those of other consuming nations to promote interdependence, as well as independence.

ACTIONS ANNOUNCED TODAY BY THE PRESIDENT

I. *ACTIONS ANNOUNCED BY THE PRESIDENT TO MEET NEAR-TERM GOALS* (1975-1977)

To meet the national goals, the President outlined a comprehensive program of legislative proposals to the Congress which he requested be enacted within 90 days and administrative actions that he will begin implementing immediately. The legislative package is more effective and equitable than the administrative program, but the President indicated that the seriousness of the situation demanded immediate action. These actions will reduce overall energy demand, increase domestic production, increase conversion to coal, and reduce oil imports. They include:

(A) *Administrative Actions*

1. *Import Fee*—Because of the seriousness of the problem and because time is required for Congressional action on his legislative proposals, the President is acting immediately within existing authorities to increase the import fees on crude oil and petroleum products. These new import fees would be modified upon passage of the President's legislative package.

   (a) Import fees on crude oil and petroleum products under the authority of the Trade Expansion Act of 1962, as amended, will be increased by $1 effective February 1, 1975, an additional $1 effective March 1, and another $1 effective April 1, for a total increase of $3.00 per barrel. Currently existing fees will also remain in effect.

   (b) FEA's "Old Oil Entitlements" program will be utilized to spread price increases on crude among all refiners and to lessen dis-

proportionate regional effects, particularly in the Northeast.

(c) As of February 1975, product imports will cease to be covered by FEA's "Old Oil Entitlements" program. In order to overcome any severe regional impacts that could be caused by large fees in import dependent areas, imported products will receive a rebate corresponding to the benefit which would have been obtained under that program. The rebate should be approximately $1.00 in February, $1.40 in March, and $1.80 per barrel in April.

(d) This import fee program would reduce imports by about 500,000 barrels per day. In April it would generate about $400 million per month in revenues.

2. *Backup Import Control Program*—The energy conservation measures and tax proposals will be supplemented by the use of Presidential power to limit oil imports as necessary to achieve the near-term goals.

3. *Crude Oil Price Decontrol*—To stimulate production and further cut demand, steps will be taken to remove price controls on domestic crude oil by April 1, 1975, subject to congressional disapproval as provided by § 4(g) of the Emergency Petroleum Allocation Act of 1973.

4. *Increase Public Education on Energy Conservation*—Energy Resources Council will step up its efforts to provide information on energy conservation methods and benefits.

(B) *Legislative Proposals*

1. *Comprehensive Tax and Decontrol Program*—The President asked the Congress to pass within 90 days a comprehensive legislative package which could lead to reduction of oil

imports of 900,000 barrels per day by 197[illegible] and 1.6 million barrels by 1977. Average oil prices would rise about $4.00 per barrel of $.10 per gallon. The package which will raise $30 billion in revenues on an annual basis includes:

(a) *Windfall Profits Tax*—A tax on all domestic crude oil to capture the windfall profits resulting from price decontrol. The tax would take 88% of the windfall profits on crude oil and would phase out over several years. The tax would be retroactive to January 1, 1975.

(b) *Petroleum Excise Tax and Import Fee*—An excise tax on all domestic crude oil of $2 per barrel and a fee on imported crude oil and product imports of $2 per barrel. The new, administratively established import fee of $3 on crude oil would be reduced to $2.00 and $1.20 fee on products would be increased to $2.00 when the tax is enacted. The product import fee would keep the excise tax from encouraging foreign refining and the related loss of jobs to the U.S.

(c) *New Natural Gas Deregulation*—Remove Federal interstate price regulation on new natural gas to increase domestic production and reduce demand for scarce natural gas supplies.

(d) *Natural Gas Excise Tax*—An excise tax on natural gas of 37¢ per thousand cubic feet (mcf), which is equivalent on a Btu basis to the $2 per barrel petroleum excise tax and fee. This will discourage attempts to switch to natural gas and acts to reduce natural gas demand curtailments. Since the usual results of gas curtailments is a switch to oil, this will limit the growth of oil imports.

2. *Elk Hills Naval Petroleum Reserve.* The President is asking the Congress to permit production of the Elk Hills Naval Petroleum Reserve (NPR #1) under Navy control. Production could reach 160,000 barrels per day early in 1975 and 300,000 barrels per day by 1977. The oil produced would be used to top off Defense Department storage tanks, with the remainder sold at auction or exchanged for refined petroleum products used by the Department of Defense. Revenues would be used to finance further exploration, development and production of the Naval petroleum reserves and the strategic petroleum storage.

3. *Conversion to the Use of Domestic Coal.* The President is asking the Congress to amend the Clean Air Act and the Energy Supply and Environmental Coordination Act of 1974 to permit a vigorous program to make greater use of domestic coal to reduce the need for oil. This program would reduce the need for oil imports by 100,000 barrels per day in 1975 and 300,000 barrels in 1977. These amendments would extend FEA's authority to grant prohibition orders from 1975 to 1977, prohibit powerplants early in the planning process from burning oil and gas, extend FEA enforcement authority from 1978 to 1985, and make clear that coal burning installations that had originally planned to convert from coal to oil be eligible for compliance date extensions. It would give EPA authority to extend compliance dates and eliminate restrictive regional environmental limitations. A plant could convert as long as its own emissions do not exceed ambient air quality standards.

II. *ACTIONS ANNOUNCED BY THE PRESIDENT TO MEET MID-TERM GOALS* (1975-1985)

These actions are designed to meet the goal of achieving the capability for energy independence by 1985. The actions include measures to increase domestic energy production (including measures to cope with constraints and strike a balance between environmental and energy objectives), reduce energy demand, and prepare for any future emergency resulting from an embargo.

(A) *Supply Actions*

1. *Naval Petroleum Reserve No. 4 (Legislative proposal)*—The President is asking the Congress to authorize the exploration, development and production of NPR-4 in Alaska to provide petroleum for the domestic economy, with 15-20% earmarked for military needs and strategic storage. The reserves in NPR-4 which are now largely unexplored could provide at least 2 million barrels of oil per day by 1985. Under the legislative proposal:

   (a) The President would be authorized to explore, develop and produce NPR-4.

   (b) The Government's share of production (approximately 15-20%) would be used to help finance the strategic storage system and to help fulfill military petroleum requirements. Any other receipts go to the United States Treasury as miscellaneous receipts.

2. *OCS Leasing (Administrative)*—The President reaffirmed his intention to continue an aggressive Outer Continental Shelf leasing policy, including lease sales in the Atlantic, Pacific, and Gulf of Alaska. Decisions on individual lease sales will await completion of appropriate environmental studies. Increased OCS leasing could add domestic production of 1.5 million barrels of oil and additional supplies of natural gas by 1985. There will be close cooperation with Coastal states in their planning for possible increased local development. Funding for environmental studies and assistance to States for planning has been increased in FY 1975.

3. *Reducing Domestic Energy Price Uncertainty (Legislative proposal)*—Legislation will be requested authorizing and requiring the President to use tariffs, import quotas, import price floors, or other measures to achieve domestic energy price levels necessary to reach self-sufficiency goals. This legislation would enable the President to cope with possible large-scale fluctuations in world oil prices.

4. *Clean Air Act Amendments (Legislative proposals)*—In addition to the amendments outlined earlier for short-term goals, the President is asking for other Clean Air Act amendments needed for a balance between environmental and energy goals. These include:

   (a) Legislative clarification to resolve problems resulting from court decisions with respect to significant air quality deterioration in areas already meeting health and welfare standards.

   (b) Extension of compliance dates through 1985 to implement a new policy regarding stack gas scrubbers—to allow use of intermittent control systems in isolated power plants through 1985 and requiring other sources to achieve control as soon as possible.

   (c) A pause for 5 years (1977-1981 model years) for nationwide auto emission standards at the current California levels for hydrocarbons (0.9 grams per mile) and carbon monoxide (9 grams per mile), and at 1975 standards (3.1 grams per mile) for oxides

of nitrogen (with the exception of California which has adopted the 2.0 standard). These standards for hydrocarbons (HC) and carbon monoxide (CO) are more stringent than now required nationwide for 1976 model year's cars. The change from the levels now required for 1977-1981 model years in the law will have no significant impact on air quality standards, yet they will facilitate attainment of the goal of 40% increase in auto fuel efficiency by the 1980 model year.

(a) EPA will shortly begin comprehensive hearings on emission controls and fuel economy which will provide more detailed data for Congressional consideration.

5. *Surface Mining (Legislative proposal)*—The President is asking the Congress to pass a surface mining bill which strikes a balance between our desires for reclamation and environmental protection and our need to increase domestic coal production substantially over the next ten years. The proposed legislation will correct the problems which led to the President's veto of a surface mining bill last year.

6. *Coal Leasing (Administrative)*—To assure rapid production from existing leases and to make new, low sulfur coal supplies available, the President directed the Secretary of the Interior to:

(a) Adopt legal diligence requirements to assure timely production from existing leases.

(b) Meet with Western Governors to explore regional questions on economic, environmental and social impacts associated with new Federal coal leases.

(c) Design a program of new coal leasing consistent with timely development and adequate return on public assets, if proper environmental safeguards can be provided.

7. *Electric Utilities*—The President is asking the Congress for legislation concerned with utilities. In recent months, 60% of planned nuclear capacity and 30% of non-nuclear capacity additions have been postponed or cancelled by electric utilities. Financing problems are worsening and State utility commission practices have not assured recovery of costs and adequate earnings. The transition from oil and gas-fired plants to coal and nuclear has been slowed greatly—contributing to pressure for higher oil imports. Actions involve:

(a) *Uniform Investment Tax Credit (Legislative)*—an increase in the investment tax credit to eliminate the gap between utilities and other industries—currently a 4% rate applies to utilities and 7% to others.

(b) *Higher Investment Tax Credit (Legislative)*—An increase in investment tax credit for all industry, including utilities, for 1 year—to 12%. The 12% rate would be retained for two additional years for all power plants except oil and gas-fired facilities.

(c) *Preferred Stock Dividend Deductions (Legislative)*—A change in tax laws applicable to all industries, including utilities, which allows deductions of preferred stock dividends for tax purposes to reduce the cost of capital and stimulate equity rather than debt financing.

(d) *Mandated Reform of State Utility Commission Processes (Legislative)*—The legislation would selectively reform utility commission practices by: (1) setting a maximum limit of 5 months for rate or service proceedings; (2) requiring fuel adjustment pass-

throughs, including taxes; (3) requiring that construction work in progress be included in a utility's rate base; (4) removing any rules prohibiting a utility from charging lower rates for electric power during off-peak hours; and (5) allowing the cost of pollution control equipment to be included in the rate base.

(e) *Energy Resources Council Study (Administrative)*—Review and report to the President on the entire regulatory process and financial situation relating to electric utilities and determine what further reforms or actions are needed. ERC will consult with State utility commissions, governors, public utilities and consumers.

8. *Nuclear Power*—To accelerate the growth of nuclear power which supplies only one percent of our energy needs, the President is proposing, in addition to actions outlined above:

(a) *Expedited Licensing and Siting (Legislative)*—A Nuclear Facility Licensing Act to assure more rapid siting and licensing of nuclear plants.

(b) *1976 Budget Increase (Legislative)*—An increase of $41 million in appropriations for nuclear safety, safeguards, and waste management.

9. *Energy Facilities Siting (Legislative)*—Legislation would reduce energy facility siting bottlenecks and assure sites for needed facilities with proper land use considerations:

(a) The legislation would require that states have a comprehensive and coordinated process for expeditious review and approval of energy facility applications; and state authorities which ensure that final State energy facility decisions cannot be nullified by actions of local governments.

(b) Provision for owners of eligible facilities or citizens to sue States for inaction.

(c) Provide no Federal role in making case by case siting decisions for the States.

(B) *Energy Conservation Actions*

The President announced a number of energy conservation measures to reduce demand, including:

1. *Auto Gasoline Mileage Increases (Administrative)*—The Secretary of Transportation has obtained written agreements with each of the major domestic automobile manufacturers which will yield a 40 percent improvement in fuel efficiency on a weighted average for all new autos by 1980 model year. These agreements are contingent upon relaxation of Clean Air Act auto emission standards. The agreement provides for interim goals, Federal monitoring and public reporting of progress.

2. *Building Thermal Standards (Legislative)*—The President is asking Congress for legislation to establish national mandatory thermal (heating and cooling) efficiency standards for new homes and commercial buildings which would save the equivalent of over one-half million barrels of oil per day by 1985. Under this legislation:

(a) The Secretary of Housing and Urban Development shall consult with engineering, architectural, consumer, labor, industry, and government representatives to advise on development of efficiency standards.

(b) Thermal standards for one and two-family dwellings will be developed and implementation would begin within one year. New minimum performance standards for energy in commercial and residential build-

ings would be developed and implemented as soon thereafter as practicable.

(c) Standards would be implemented by State and local governments through local building codes.

(d) The President also directed the Secretary of Housing and Urban Development to include energy conservation standards in new mobile home construction and safety standards.

3. *Residential Conservation Tax Credit*—The President is asking Congress for legislation to provide incentives to homeowners for making thermal efficiency improvements in existing homes. This measure, along with a stepped-up public information program, could save the equivalent of over 500,000 barrels per day by 1985. Under this legislation:

(a) A 15 percent tax credit retroactive to January 1, 1975 for the cost of certain improvements in thermal efficiency in residences would be provided. Tax credits would apply to the first $1,000 of expenditures and can be claimed during the next three years.

(b) Improvements such as storm windows, and insulation, would qualify for the tax credit.

Low-Income Energy Conservation Program (Legislative)—The President is proposing legislation to establish a Low-Income Energy Conservation Program to offer direct subsidies to low-income and elderly homeowners for certain energy conservation improvements such as insulation. The program is modeled upon a successful pilot program in Maine.

(a) The program would be administered by FEA, under new legislation, and the President is requesting supplemental appropriations in 1975 and $55 million in fiscal year 1976.

(b) Acting through the States, Federal funds would be provided to purchase materials. Volunteers or community groups could install the materials.

5. *Appliance Efficiency Standards (Administrative)*—The President directed the Energy Resources Council to develop energy efficiency goals for major appliances and to obtain agreements within six months from the major manufacturers of these appliances to comply with the goals. The goal is a 20% average improvement by 1980 for all major appliances, including air conditioners, refrigerators and other home appliances. Achievement of these goals would save the equivalent of over one-half million barrels of oil per day by 1985. If agreement cannot be reached, the President will submit legislation to establish mandatory appliance efficiency standards.

6. *Appliance and Auto Efficiency Labeling Act (Legislative)*—The President will ask the Congress to enact a mandatory labelling bill to require that energy efficiency labels be placed on new appliances and autos.

(C) *Emergency Preparedness*

The President announced that comprehensive energy emergency legislation will be proposed, encompassing two major components.

1. *Strategic Petroleum Storage (Legislative)*—Development of an energy storage system of one billion barrels for domestic use and 300 million barrels for military use. The legislation will authorize the government to purchase and prepare the storage facilities (salt domes or steel tanks), while complex institutional questions are resolved and before oil for

storage is actually purchased. FEA will develop the overall program in cooperation with the Department of the Interior and the Department of Defense. All engineering, planning, and environmental studies would be completed within one year. The 1.3 billion barrels will not be complete for some years, since time is required to purchase, prepare, and fill the facilities.

2. *Standby and Planning Authorities (Legislative)*—The President is requesting a set of emergency standby authorities to be used to deal with any significant future energy shortages. These authorities would also enable the United States to fully implement the agreement on an International Energy Program between the United States and other nations signed on November 18, 1974. This legislation would include the authority to:

(a) Implement energy conservation plans to reduce demand for energy;

(b) allocate petroleum products and establish price controls for allocated products;

(c) ration fuels among end users;

(d) allocate materials needed for energy production where such materials may be in short supply;

(e) increase production of domestic oil; and

(f) regulate petroleum inventories.

III. *ACTIONS ANNOUNCED BY THE PRESIDENT TO MEET LONG-TERM GOALS (BEYOND 1985)*

The expanded research and development program on which the nation is embarked will provide the basis for increasing domestic energy supplies and maintaining energy independence. It will also make it possible in the

long run for the U.S. to export energy supplies and technology to others in the free world. Important elements are:

(A) *Synthetic Fuels Program (Administrative)*—The President announced a National Synthetic Fuels Commercialization Program to ensure at least one million barrels per day equivalent of synthetic fuels capacity by 1985, using technologies now nearing commercial application.

1. Synthetic fuel types to be considered will include synthetic crude from oil shale and a wide range of clean solid, liquid, and gaseous fuels derived from coal.

2. The Program would entail Federal incentives (possibly including price guarantees, purchase agreements, capital subsidies, leasing programs, etc.), granted competitively, and would be aimed at the production of selected types of gaseous and liquid fuels from both coal and oil shale.

3. The program will rely on existing legislative authorities, including those contained in the Federal Non-Nuclear Energy Research and Development Act of 1974, but new legislative authorities will be requested if necessary.

(B) Energy Research and Development Program—In the current fiscal year, the Federal Government has greatly increased its funding for energy research and development programs. These Federal programs are a part of a much larger national energy R & D effort and are carried out in cooperation with industry, colleges and universities and others. The President stated that his 1976 Budget will continue to emphasize these accelerated programs which include research and the development of technology for energy conservation and on all forms of energy including

fossil fuels, nuclear fission and fusion, solar and geothermal.

(C) Energy Research and Development Administration—(ERDA) The President has signed an Executive Order which activates, effective January 19, 1975, the Energy Research and Development Administration. ERDA will bring together in a single agency the major Federal energy R & D programs which will have the responsibility for leading the national effort to develop technology to assure that the U.S. will have an ample and secure supply of energy at reasonable prices. ERDA consolidates major R & D functions previously handled by the AEC, Department of the Interior, National Science Foundation and Environmental Protection Agency. ERDA will also continue the basic research, nuclear materials production and weapons programs of the AEC.

IMPACTS OF NEAR AND MID-TERM ACTIONS ON PETROLEUM CONSUMPTION AND IMPORTS

NEAR TERM PROGRAM
(MMB/D)

	1975	1977
CONSUMPTION IF NO NEW ACTIONS	18.0	18.3
IMPORTS IF NO NEW ACTIONS	6.5	8.0
	IMPORT SAVINGS	
Less Service Savings by Short-term Actions:	1975	1977
Production from Elk Hills	0.2	0.3
Coal Conversion	0.1	0.3
Tax Package	0.9	1.6
TOTAL IMPORT SAVINGS	1.2	2.2
REMAINING IMPORTS	5.3	5.8

MID-TERM PROGRAM

CONSUMPTION IF NO NEW ACTIONS	23.9 MMB/D	
IMPORTS IF NO NEW ACTIONS	12.7 MMB/D	
Less Savings Achieved by Following Actions:	1985 IMPACT ON IMPORTS	
OCS Leasing	1.5	
NPR-4 Development	2.0	
Coal Conversion	0.4	
Synthetic Fuel Commercialization	0.3	
Auto Efficiency Standards	1.0	
Continuation of Taxes	2.1	
Appliance Efficiency Goals	0.1	
Insulation Tax Credit	0.3	
Thermal Standards	0.2	
Total Import Savings by Actions		8.0
Remaining Imports		4.7
Less:		
Emergency Storage	3.0	
Standby Authorities	1.7	
NET IMPORT VULNERABILITY		0

INTERNATIONAL ENERGY POLICY AND FINANCING ARRANGEMENTS

BACKGROUND

The cartel created by the Organization of Petroleum Exporting Countries (OPEC) has successfully increased their governments' price for exports of oil from approximately $2 per barrel in mid 1973 to $10 per barrel today. Even after paying for their own increased imports, OPEC nations will report a surplus of over $60 billion in 1974, which must be invested. Oil price increases have created serious problems for the world economy. Inflation pressures have been intensified. Domestic economies have been disrupted. Consuming nations have been reluctant to borrow to finance their oil purchases because of current balance of payments risks and the burden of future interest costs and the repayment of massive debts. Inter-

national economic relations have been distorted by the large flows of capital and uncertainties about the future.

U.S. POSITION

The United States believes that the increased price of oil is the major international economic problem and has proposed a comprehensive program for reducing the current exorbitant price. Oil importing nations must cooperate to reduce consumption and accelerate the development of new sources of energy in order to create the economic conditions for a lower oil price. However, until the price of oil does decline, international stability must be protected by financing facilities to assure oil importing nations that financing will be available on reasonable terms to pay for their oil imports. The United States is active in developing these financing programs. Once a cooperative program for energy conservation and resource development and the interim financing arrangements are agreed upon, it will be possible to have constructive meetings with the oil producers.

ACTIONS TAKEN BY OIL CONSUMING NATIONS

The oil consuming nations have already created the International Energy Agency to coordinate conservation and resource development programs and policies for reacting to any future interruption of oil exports by producing nations. The four major elements of this cooperative program are:

An emergency sharing arrangement to immediately reduce member vulnerability to actual or threatened embargoes by producers,

A long-term cooperative program to reduce member-nation dependence on imported oil,

A comprehensive information system designed to improve our knowledge about the world oil market and to provide a basis for consultations among members and individual companies; and

A framework for coordinating relations with producing nations and other less developed consuming countries.

The International Energy Agency has been established as an autonomous organization under the OECD. It is open to all OECD nations willing and able to meet the obligations created by the program. This international agreement establishes a number of conservation and energy resources development goals but each member is left free to determine what domestic measures to use in achieving the targets. This flexibility enables the United States to coordinate our national and international energy goals.

OTHER U.S. ACTIONS AND PROPOSALS

The United States has also supported programs for protecting international stability against distorting financial flows created by the sudden increase of oil prices. Although the massive surplus of export earnings accumulated by the producing nations will have to be invested in the oil consuming nations, it is unlikely that these investments will be distributed so as to match exactly the financing needs of individual importing nations. Fortunately the existing complex of private and official financial institutions has, in the case of the industrialized countries, been effective in redistributing the massive oil export earnings to date. However, there is concern that some individual industrialized nations may not be able to continue to obtain needed funds at reasonable interest rates and terms during the transition period until supplies are increased, conservation efforts reduce oil imports and the price of oil declines. Therefore, the United States has supported various proposals for "reshuffling" the recycled funds among oil consuming nations, including:

Modification of International Monetary Fund (IMF) rules to permit more extensive use of existing IMF resources without further delay;

Creation of a financial solidarity facility as a "safety net" for participating OECD countries that are pre-

pared to cooperate in an effort to increase conservation and energy resource development actions to create pressure to reduce the present price of oil;

Establishment of a special trust fund managed by the IMF which would extend balance of payments assistance to the most seriously affected developing nations on a concessional basis not now possible under IMF rules. The United States hopes that oil exporting nations might contribute a major share of the trust fund and that additional resources might be provided through the sale of a small portion of the IMF's gold holdings in which the differential between the original cost of the gold and the current market price would be added to the trust fund; and

An increase in IMF quotas which would make more resources available in 1976.

These proposals will be discussed at ministerial level meetings of the Group of Ten, the IMF Interim Committee and the International Monetary Fund/International Bank for Reconstruction and Development Committee in Washington, D. C. January 14 to 17.

In these meetings, the United States will continue to press its views concerning the fundamental importance of international cooperation to achieve necessary conservation and energy resources development goals as a basis for protecting our national security and underlying economic strength.

EMBARGO FOR RELEASE UNTIL
1:00 pm, January 15, 1975

OUTLINE OF ENERGY QUESTIONS AND ANSWERS

BACKGROUND

- Data History and Forecasts

NEAR-TERM ACTIONS

- Import Fee, Tax and Decontrol
- Naval Petroleum Reserve

MID-TERM PROGRAM

- Outer Continental Shelf Production
- Domestic Price Uncertainty
- Clean Air Act Amendments
- Strip Mining Legislation
- Coal Leasing and Prices
- Electric Utilities
- Energy Facility Siting
- Energy Conservation

EMERGENCY PLANNING MEASURES

- Emergency Storage
- Standby Authority

LONG-TERM ACTIONS

- Research and Development

ECONOMIC IMPACT

INTERNATIONAL

GENERAL

BACKGROUND

DATA HISTORY AND FORECASTS

Q. Has demand for petroleum products increased since the embargo?

A. Domestic consumption of energy is now beginning to increase again and is estimated to keep growing, although at a slower rate than prior to the embargo. The latest figures show total domestic demand to be at 18.2 million barrels per day (MMB/D) as compared to 17.7 MMB/D at the close of 1973. Gasoline consumption dropped 3.4 percent during the first 9 months of 1974 (as compared to 1973), but has increased since September by about 300,000 barrels per day.

Q. What about production and import levels?

A. Domestic oil production continues to decline as older fields have reached their peak. During the first eleven months of 1974, domestic production averaged 8.8 MMB/D as compared to 9.2 MMB/D in 1973. As a result, imports continue to rise even with present high prices. We are now importing 7.3 MMB/D (average of 6.8 MMB/D in last quarter of 1974), as compared to 6.5 MMB/D in October, 1973, the month prior to the embargo.

Q. What about coal production?

A. Coal (approximately 20 percent of domestic energy production) was the only major energy source that showed increased output during the first three quarters of 1974. Coal production in October was 5 percent above its level for the same period in 1973. However, the strike in November interrupted coal output and the industry has not yet regained former production levels.

Q. Do you foresee any shortages in the next 6 months?

A. We do not expect shortages of petroleum products but we do project large shortages for natural gas,

as high as 14 percent. The greatest impact will be felt by electric utilities and industries that receive natural gas on an interruptible contract basis. These curtailments of natural gas have already had a serious impact on employment.

Q. How high are current inventories?

A. FEA figures indicate that December, 1974 crude oil stocks were about 20 million barrels higher (this is an adjusted figure to account for disparities between the American Petroleum Institute and FEA reporting methods) than the same period of 1973. Similarly, stocks for refined petroleum products were higher in December 1974 than the corresponding month in 1973 due to reduced demand and increased imports. Coal stocks, however, are down as a result of the recent UMW strike.

NEAR-TERM ACTIONS

IMPORT FEE, TAX AND DECONTROL

Q. Will the fee on imports create additional profits for the oil companies?

A. No, the import fee, by itself, will not increase industry profits. However, the fee will place an upward pressure on the price for crude. Since the price of uncontrolled domestic crude will rise to meet the world price, industry profits will also rise. This is why we are calling for a windfall profits tax as part of the energy proposals. It will be retroactive to collect any profits caused by Administrative actions.

Q. Won't certain areas of the country which are heavily dependent on crude oil or product imports suffer a disproportionate burden as a result of the tariff?

A. No. The FEA is currently administering a program which substantially equalizes the cost of crude oil to all domestic refiners. This crude equalization program aids refiners with high crude costs at the

expense of other refiners which have access to price-controlled domestic crude. Further, the product fees will be less than crude fees; there will be a $3 fee on crude and a $1.20 fee on refined products in April.

Q. How does a tax or fee achieve our national energy goals?

A. As a result of these measures, petroleum products will become more expensive relative to other goods and services, thereby encouraging conservation and discouraging consumption. Also, making imports more expensive than domestic supplies of petroleum encourages the production of domestic crude oil.

Q. Will the fee help to lower world crude prices and protect us from another embargo?

A. The fee program will help to reduce our imports of foreign oil by reducing our overall demand. As a result, we will have less demand for products from some OPEC nations. To this extent, it may affect some prices being charged by certain OPEC nations. But overall, the fee will have a minimal effect on lowering world crude prices in the immediate future.

Q. Why didn't you tighten the mandatory allocation program which you already have authority to administer rather than raising prices? Why not rationing?

A. The mandatory allocation program was designed in response to an emergency situation, and does not address the more basic economic issues. A tighter mandatory allocation program could necessitate a significant increase in the Federal bureaucracy and could mean a return to the long gasoline lines we experienced last winter. Additionally, rationing and price control programs are inevitably discriminatory against those who would enter the market and provide competition.

While the Administration's program, which relies on the market forces, is more effective, the President announced his intention to guarantee reaching the goals by using his authority to limit imports if necessary.

Q. How much more expensive will gasoline and other products be?

A. On the average, if costs of a crude import $3 fee are spread evenly among all products, prices of gasoline and other petroleum products refined from the higher priced imported crude could rise as much as 5 cents per gallon (controlled domestic oil will stay at the same price).

The total tax package and decontrol would ultimately add about $4 a barrel (10 cents per gallon) to the average costs of all products.

Q. What are the limits to the President's power to institute a fee?

A. The President may impose a fee in response to a national security finding and should be established at that amount sufficient to offset the threat to national security.

Q. What additional actions are you asking from Congress?

A. In conjunction with the establishment of the fee, we are asking Congress for an excise tax on domestic crude oil (and will maintain a fee on all imports), the decontrol of old crude oil, deregulation of new natural gas, windfall profits tax, and a natural gas excise tax.

Q. What are the differences between a tax, a fee and a tariff?

A. All three are charges which can be used to produce revenue and all three have the effect of reducing demand. The differences lie in the source of authority to levy the charge. A tax must be levied

by Congress for the purpose of raising domestic revenue. A tariff is a charge against imports and must also be authorized by the Congress. A fee is also levied on imported material but may be set for non-revenue purposes and need not be legislated.

Q. How much oil will the combined tax/fee program save?

A. The overall tax-package will save an estimated 1.6 MMB/D in 1977 and about 1.0 MMB/D in 1975.

Q. Will there be rationing?

A. No, not unless another emergency embargo situation necessitates it.

Q. Why not?

A. Rationing will not solve our long-term problems and will create severe energy disruptions in life-styles and would require a large bureaucracy to administer.

Q. Wouldn't it be better to reduce demand by imposing import quotas instead of raising prices through a fee?

A. No, it would not. Import quotas can cause disparities in the marketplace by mandating specific, allowable levels of products into the country. By raising prices via a fee, the individual consumer can determine in what areas to conserve. While we are not considering the use of import quotas at this time, we will submit legislation requesting the authority to use tariffs, import quotas or other measures to achieve energy price levels necessary to reach our goals. The Message stated that Presidential power to limit oil imports would be used if necessary.

Q. What is the effect of decontrolling domestic old oil?

A. Prices on the domestic market will rise to meet world oil prices, and oil industry profits will also rise. This is why we must have immediate enactment of a windfall profits tax—to preclude this from happening.

Q. Why are you requesting the deregulation of natural gas prices?

A. I want to let the free market work to the maximum extent possible. The deregulation of natural gas prices will greatly encourage higher production levels in the long run. As you know, we are currently faced with a natural gas shortage of 14 percent for this winter. In the short run, higher prices will serve to lessen demand and will therefore mitigate the severity of this projected shortage.

Q. Isn't the ultimate effect of this action going to be increased prices to the consumer?

A. Yes, this will be the effect. We estimate that the typical monthly natural gas bill to the consumer would increase by about $8 by 1985. The alternative to deregulation is less natural gas and higher costs for other fuels, such as petroleum and electricity.

Q. How much will natural gas prices rise in the next few years?

A. We estimate that, as a result of deregulation, the average natural gas prices will rise from 31¢/mcf in the interstate market in 1974, to 35¢/mcf in 1975; 38¢/mcf in 1976; and 41¢/mcf in 1977. The average national natural gas price will be higher, because intrastate gas is not controlled.

The estimated market clearing price for natural gas is 99¢/mcf, and would be reached by 1985.

Q. Why are you placing an excise tax on domestic natural gas?

A. The excise tax on natural gas will approximate the excise tax and import fees on oil on a Btu equivalency basis. It will also inhibit preference for natural gas over oil. This tax will reduce the curtailment problem and lessen negative employment effects.

Q. How much will the production of old oil be stimulated by price decontrol?

A. We estimate that price decontrol could result in an additional 1-2 MMB/D of crude oil production in the next 3-4 years.

Q. What are the advantages of an import fee over a gasoline tax?

A. An import fee covers all crude and product imports and spreads the effects of demand reduction more evenly than a gas tax. The gasoline tax would have to be very large to save an equivalent amount of oil—at least 30¢ per gallon—and it would severely affect the already depressed automobile industry and numerous related industries.

Q. Why doesn't the Administration provide priority treatment in domestic production of crude oil relative to the levying of tariffs and excise taxes? For example, the fee on imported crude could be $2.00 per barrel, whereas, the domestic excise tax would be at $1.50. Won't such action encourage domestic exploration as a result of an additional financial incentive?

A. The immediate import fees will raise the prices of imports relative to domestic production. In the long-run, and at the margin, decontrolled domestic crude would rise to the same selling price as foreign crude, and any differential in taxes would probably only result in additional profits. Further, decontrol of old oil and higher prices should provide sufficient incentives to produce.

NAVAL PETROLEUM RESERVES

Q. What is your specific proposal with regard to the Naval Petroleum Reserves?

A. There are two proposals involved. We have asked Congress to permit production of the Elk Hills, California, Naval Petroleum Reserve (NPR-1) under Navy control and are submitting legislation to the Congress to authorize the exploration, development and production of NPR-4 in Alaska. The oil produced from NPR-1 would be used to top off all Defense Department storage tanks with the remainder to be sold at auction or exchanged for refined petroleum products used by the Department of Defense. The production from NPR-4 would provide petroleum for the domestic economy as well as for defense needs.

Q. Who will have Government authority for developing NPR #1?

A. I have asked the Congress to permit production of the Elk Hills Naval Petroleum Reserve under Navy control.

Q. How quickly can NPR-1 and NPR-4 be brought onstream?

A. NPR-1 can produce 160,000 barrels per day within a few months and 300,000 barrels per day by 1977. NPR-4 will take longer to produce as exploration and development must first take place.

Q. Can we use the Trans-Alaska Pipeline to move NPR-4 oil?

A. No. North Slope oil production will fill the capacity of the Trans-Alaska Pipeline and thus new transportation facilities will be needed for NPR-4.

Q. What is the time frame and cost involved in retrieving oil and gas from NPR-4 in Alaska?

A. The development of NPR-4 will require several years and production is not expected before 1982 at the earliest. The cost would be more than $400 million if exploration is done by the Government. If any part of NPR-4 is leased commercially, revenues could more than offset costs. It is estimated that about two million barrels per day can be produced in NPR-4.

MID-TERM PROGRAM

OUTER CONTINENTAL SHELF PRODUCTION

Q. How do you know there are sufficient quantities of oil and gas in the Outer Continental Shelf to make its development worthwhile?

A. We don't know for sure that there are sufficient quantities for development although geological formations indicate that there may be. We are reaffirming our intention to continue an aggressive exploration and development policy.

Q. What will be done to insure that the environmental impacts of oil and gas development in the OCS and other frontier areas will be kept to safe levels?

A. We already have an extensive body of law designed to protect these areas from unacceptable levels of environmental damage and a whole new level of technology (environmental monitoring protection) has been developed in response to these new laws. In the field of oil and gas development technical procedures and equipment are now in use designed to prevent oil spills and to minimize and control them once they occur. In addition the development of environmental baselines and the requirement to monitor the sites under development insures that any adverse effects will be detected early to allow proper and effective counteraction.

The Council on Environmental Quality conducted an extensive study of oil and gas exploration in the offshore areas of the U.S. and concluded that with proper safeguards, these areas can be safely developed. The Department of the Interior has now adopted literally all of the recommendations of the CEQ report.

In addition, new funds are being requested for coastal zone management to investigate and develop further the additional safeguards needed to protect our environment. Of course, before any leasing of frontier areas is done, there will be extensive public hearings and environmental impact statements to advise the public of the safeguards being taken.

DOMESTIC PRICE UNCERTAINTY

Q. How would you determine when our vulnerability to pressure from oil exporting countries is high enough to make a price floor or other measure desirable?

A. Our vulnerability becomes unacceptable when our expected level of imports could not be completely replaced by emergency storage and standby actions. If the price of imported oil declines considerably, demand for oil would increase and import levels would get much higher.

Q. What is the difference between a quota and a price floor on imports?

A. A qouta is designed to restrict the actual amount of imports into the country while a price floor sets a minimum price for imports so that domestic fuels will remain economically competitive with foreign sources.

Q. Wouldn't price floors maintain oil prices you have claimed are exorbitant?

A. We would have no intention of setting a floor price at current world oil price levels ($11-12 per barrel). Rather, price floors could conceivably be set at a significantly lower level and still keep traditional domestic sources economic.

CLEAN AIR ACT AMENDMENTS

Q. Will the Clean Fuels Deficit be eliminated by your proposed energy actions?

A. Yes. The Clean Fuels Deficit is a term used to describe the potential shortage of low sulfur coal needed to meet emission limitations in 1975 and beyond. This shortage of low sulfur coal was at one point estimated to be as high as 200 million tons by mid-1975. The alternatives to these actions would be to curtail coal burning, thereby curtailing electric energy generation, or to import low sulfur oil

to fill the low sulfur coal gaps, thereby increasing our oil imports. The actions I propose include voluntary revision of State emission limitations, implementation of supplementary control systems and extensions of compliance deadlines to eliminate this problem.

Q. By relaxing auto emission requirements, aren't you letting the auto industry off the hook and at the same time lowering the quality of our air?

A. No. We are actually moving to a tougher standard than now in force. I would like to emphasize that compliance with the legislative standards will still be required and cleaner air will thus be achieved. The interim standards set carbon monoxide and hydrocarbon emissions at the current California levels (9.0 grams and .9 grams per mile respectively) and NOx emissions at 3.1 grams per mile for all States except California, where 2.0 grams per mile will still be required. Thus, the quality of our air will not be significantly impaired nor will we be retreating to the uncontrolled emission levels allowed before the passage of the Clean Air Act.

The proposal to extend the time required to comply with the original 1977 auto emission standards is based on the need to balance fuel conservation with the Clean Air Act requirements; simply proceeding with the present schedule for emission controls would have involved the additional consumption of 1½ to 5½ billion gallons of gasoline per year by 1980. By extending the time required to comply with the final emission limitations we achieve fuel conservation in the form of a 40 percent fuel efficiency improvement.

Q. What are your plans for stack gas scrubbers?

A. Certainly some types of scrubbers have not reached the level of effectiveness that other designs have reached. However, scrubbers will play an important

role in our future expanded use of coal. By 1985, we expect that all plants which need scrubbers will have them.

Q. Won't the Clean Air Act (CAA) and the Energy Supply and Environmental Coordination Act (ESECA) Amendments which you are proposing mean a retreat from our present efforts to clean the nation's air?

A. No, it will not. There will be a delay in achieving certain standards but the commitment remains firm.

The purpose of these proposed amendments is to facilitate the use of coal thereby reducing our dependence on imported oil and to resolve the clean fuels shortage created by the unavailability of low sulfur coal and stack gas scrubbers. In no way are they intended to trade off our environmental needs for some quick energy solutions.

Q. How will your plan to convert electric utilities from oil to coal affect air quality?

A. There may be an absolute increase in air pollution as a result of converting from oil to coal but the burning of coal itself will not adversely affect air quality since all coal conversion candidates will have to develop plans for complying with primary air quality standards. These plans must be approved by the Enironmental Protection Agency before conversion orders may be placed in effect. In certain instances, an oil burning facility required to convert to coal may have difficulty obtaining the necessary low sulfur coal or pollution control equipment. Such facilities will not be converted unless they can comply with ambient air quality standards which protect health.

Q. It has been reported that the delays you propose in auto emission requirements represent a deal with Detroit to gain your 40 percent fuel efficiency goal—is this true?

A. No, there is no deal involved. But this action is a recognition of the technical limitations that now

exist in trying to meet both the auto emission requirements as they presently exist and the 40 percent increased fuel efficiency goal. By allowing for the delay we are providing for a more gradual and less disruptive development of emission control equipment while at the same time achieving a 40 percent increase in fuel efficiency.

STRIP MINING LEGISLATION

Q. How will your proposed strip mining bill differ from the proposed bill which Congress developed and you vetoed?

A. On December 30, 1974, I gave my objections to the strip mining bill proposed by Congress. The Congressional bill would have resulted in a reduction in coal production, and also contained too many vague and unclear requirements that could have led to an extensive litigation between the Federal Government and various private interest groups. The bill I will propose will be similar in many respects to the bill developed by Congress but amended to minimize these objections.

COAL LEASING AND PRICES

Q. Why do we need increased coal leasing in the United States?

A. In order for the nation to meet the goals I have announced, we must act quickly to remove constraints and provide new incentives for domestic production. We must focus our production capability on coal as it is our most abundant domestic resource. The Federal Government owns over 200 billion tons of coal reserves, but only 6 billion tons are currently scheduled to support production by 1980. Thus, we should move ahead to design a new program of coal leasing and should speed up production from these leases, providing the environmental impact of these actions is acceptable.

Q. What was the effect of the United Mine Workers strike on coal prices?

A. Coal prices rose substantially on the spot market in anticipation of and during the UMW strike. The cost of the new UMW contract will add approximately $2-3 to the price of a ton of coal in 3 years. Other factors continue to exert upward pressure on coal prices, the most notable of which is the return to the use of less expensive coal in place of higher priced oil by electric utilities.

Q. Even though the reserves are there, can the coal industry produce as much coal as we need in the short term?

A. If we eliminate the uncertainties surrounding coal production, we can substantially close the gap between coal supply and demand. The program I have outlined addresses all these uncertainties (strip-mining legislation, coal leasing, Clean Air Act implementation, oil import policy, natural gas pricing policy and electricity demand) and should serve to assure an increased production of coal. We may not, however, be able to assure that coal production meets our demands in the very near future due to the current high oil prices and the shortage of natural gas which heightens coal use. Increased coal production is also constrained by manpower and equipment shortages in the short term.

ELECTRIC UTILITIES

Q. What legislative changes are you proposing for electric utility rate structures?

A. The legislation we are proposing will require state regulatory authorities to permit the utilities under their jurisdiction to generate sufficient revenues to cover costs during a period of rapid inflation and heavy capital expansion requirements.

Three of the provisions, including the cost of construction work in progress in the rate base man-

dating fuel adjustment pass-throughs, and setting a 5 month maximum processing time for regulatory hearings, would require all authorities to adopt procedures that are now being used in many jurisdictions.

The off-peak pricing proposal would prevent authorities from limiting electric utilities in their efforts to increase revenues by selling more power during slack demand periods.

Q. You said you would take further actions to aid electric utilities if necessary. What actions do you anticipate?

A. At this time, more than 60 percent of all planned nuclear plants have been delayed or cancelled. The Energy Resources Council will be working with the utilities and, if warranted, we will propose additional measures to get these plants going again.

Q. Many of these proposals will lead to increases in utility rates. How large will these increases be?

A. The inclusion of Construction Work in Progress in the rate base would add about 11 percent a year to prices and the limitation on rate decision delay would add about 5 percent next year, and probably less thereafter. The other proposals would add 1 to 2 percent to rates. In all, for the first full year in which the charges would take effect, the additional increase would be almost 20 percent.

Q. Why are you proposing rate increases in a time of double-digit inflation?

A. The increases in cost of electricity must be paid either directly by consumers, or indirectly through Government subsidy. Direct increases will cut back demand and reduce the overall increase required. A Government subsidy, on the other hand, means that everybody pays, whether they use more or less. Therefore, price increases for electricity will assure that those who use more, pay more.

Q. I'm using less electricity but paying more. Why?

A. Under last year's unusual circumstances (unprecedented oil price increases) the average per unit cost of electricity to industry rose 55 percent and 20 percent to residential consumers. This increase was so large that it offset most efforts to cut consumption. Rates should not increase as fast this year.

Q. Isn't the electric utility industry already making record profits?

A. Profits did increase through 1973. However, in 1974, they began to decline. For the first three quarters of 1974, aggregate profits for the utility industry declined by about 7 percent from those of the equivalent period of 1973. The critical issue, however, is that investor-owned electric utilities are now earning less than three times their total interest charges. A number of utilities are only barely meeting statutory requirements for interest coverage.

Q. How do you intend to monitor what electric utilities pay for fuel to make sure they are trying to be as cost-conscious as possible?

A. Our proposal calls for the appropriate local regulatory authority to allow a justified fuel pass-through. It will continue to be the function of that authority to oversee these regulations.

Q. If investor-owned utilities are unable to remain solvent without Federal intervention, why aren't you proposing public ownership at the State/municipal level or nationalization?

A. Public ownership as a solution implies that such ownership can solve the problem more cheaply. However, there is no consensus that publicly owned power is cheaper than privately owned power in the United States, except to the extent that it receives subsidization through cheaper capital and lower taxes. Such subsidy would tend to stimulate consumption relative to private ownership, and would be more expensive in the long run.

Q. Aren't you suggesting an infringement of states' rights? Isn't this unconstitutional?

A. While regulation of utility rates has traditionally been under State jurisdiction, the interest of the country as a whole is at stake. Specifically, the Interstate Commerce Clause gives the Federal Government the authority to regulate activities that affect interstate commerce—and it has been determined that consumption of electricity does affect interstate commerce. Most of these proposals are not new and already exist in many states. What we propose will establish uniformity across the nation resulting in more equitable treatment of all public utilities.

ENERGY FACILITY SITING

Q. What will the role of the States be in energy facility siting?

A. Under the proposed facilities siting legislation, States will be required to develop and submit comprehensive management plans to the FEA for the siting and construction of needed energy facilities within their boundaries. Each management plan will have to be approved by the FEA before State implementation may begin.

Q. What if FEA does not approve a plan?

A. If a State fails to formulate an acceptable plan, the FEA Administrator may promulgate an energy facility management program for the State to administer.

Q. Can a State veto an FEA promulgated plan?

A. No.

Q. Will the bill authorize FEA to overturn a State decision on a particular site application?

A. No. If a State fails to comply with the plans requirements in a particular case, the applicant may seek relief in the courts.

ENERGY CONSERVATION

Q. Are the specific conservation measures you've proposed tough enough to provide the petroleum demand reduction necessary to achieve the import goal in 1977?

A. Yes, they are. We are setting a goal to reduce imports by 2 MMB/D by the end of 1977. The savings from increased taxes and import fees amount to 1.6 MMB/D while coal conversion will bring an 0.3 MMB/D oil saving. The development of Elk Hills Naval Petroleum Reserve will allow us to cut another 0.3 MMB/D from our import needs and additional conservation programs (public information, auto efficiency standards, thermal standards, voluntary appliance standards) will save even more.

Q. Why do we need long term conservation measures if, according to the Project Independence Report, accelerated development of our supplies alone will lead us to energy independence in 1985 if oil prices stay at $11 per barrel?

A. We need long term conservation goals specifically because we do not expect that the future price of world oil will be $11 and we do not want prices that high. Since the world price may drop considerably below $11 per barrel, we must make sure that the resulting increased demand will not increase our imports. We also need to stop using energy wastefully and to preserve our limited oil resources as much as possible.

Q. Will the conservation program you proposed result in attainment of the goal of one million barrels per day savings in imports for 1975 that you established in your energy message to Congress in October, 1974?

A. Yes. If it is all carried out—higher prices resulting from the tariff and excise taxes, combined with the comparatively smaller immediate effects of specific conservation measures, such as the expanded con-

servation education program, the development of the Elk Hills Naval Petroleum Reserve, and coal conversion should provide us with at least one million barrels per day savings in projected imports by the fourth quarter of 1975.

However, attainment of this very near term goal is not enough. Our attention must turn to the far tougher goals of reducing our vulnerability to foreign supply curtailments through 1977, and eliminating it by 1985.

Q. If energy efficiency improvements in the home effectively reduce fuel costs, why is a tax credit needed for thermal improvements?

A. More and more Americans are highly mobile and do not remain in the same house for long periods of time. Because of this factor, and because it may take a few years to make thermal insulation pay off economically, a tax credit will encourage homeowners to insulate now regardless of how long they reside in the same house.

Secondly, because the economics of insulation do not pay off quickly, homeowners will have to pay higher first costs. In this period of recession many will find it difficult to pay higher first costs and a tax credit will help.

Q. Has the 55 m.p.h. speed limit been effective?

A. Yes. Lower speed limits are directly attributable to lower death rates on our highways and is a factor in reduced gasoline consumption. As you know, the President just signed into law a bill making the 55 m.p.h. speed limit a national mandatory limit for interstate highways and urges all State Governors to vigorously enforce this limit.

Q. What steps are you taking to assure that conservation goals are met by industry?

A. Members of the Administration have been meeting with industrial leaders on a regular basis to work out programs of industrial conservation. We are receiving commitments from these industries to con-

serve more energy and I am confident that industry is prepared to conserve as much as possible. If savings are not achieved by voluntary means, however, mandatory measures will be considered.

Q. Will the mandatory thermal standards delay recovery for the construction industry anticipated during the second half of 1975?

A. Since the mandatory thermal standards proposed will take six months to formulate, and subsequently will be implemented in a phased program over three years, this conservation action should have no impact on the recovery of construction expected during 1975.

Q. Why did you decide against mandatory appliance standards?

A. As in the case of automobile efficiency standards, before the Government should intervene in the marketplace, industry should be provided an opportunity to demonstrate that it can act responsibly and responsively to the higher value on energy. For this reason, we have allowed a short period for industry to voluntarily institute measures to increase energy efficiency in appliances and have asked the Energy Resources Council to work with industry to establish the voluntary standards.

Q. Why haven't you initiated any new public transportation programs?

A. We are already doing a number of things to stimulate use of mass transit, including a rapid increase in funds for its development. Additional actions have not been taken because they would only result in small additional savings of energy.

Q. Do you think your total energy program places as much emphasis on conservation as it does on resource development?

A. Yes. The program being proposed is a tough mandatory energy conservation program and relies heavily on conservation to reduce imports in the short-term.

EMERGENCY PLANNING MEASURES

EMERGENCY STORAGE

Q. What kind of specific authority are you requesting with regard to emergency storage?

A. We are requesting authority to create and maintain a strategic reserve capacity of more than 1 billion barrels of petroleum and petroleum products and the authority to determine under what circumstances and to what extent those reserves should be used during emergency situations. This is sufficient to provide 3 million barrels of oil per day for a full year.

Q. What is the benefit of a storage program to safeguard against an embargo if it won't be operational until 1980?

A. While it is true that a storage program won't be fully operational before 1980, it will provide some protection between now and then as stocks are gradually accumulated. Further, we will need the protection provided by a storage program after 1980, as the nation will continue to be dependent upon foreign imports to meet some portion of its energy needs. During this interim period, we will continue our efforts toward stringent conservation by all consuming nations.

Q. How will the program be financed and will the ownership be public or private?

A. We have not firmly established yet how the program will be financed or who will own the storage facilities. These questions will be fully explored later in the planning and engineering stage.

Q. What products will be stored—crude as well as refined products?

A. We currently anticipate that we will store predominantly crude oil, although there will probably be some storage of petroleum products, mainly for the

needs of the Northeastern part of our country. The specific amounts of each type of storage will be determined in the planning stages.

Q. Why would oil be stored in salt domes located in the Gulf Coast, when other regions are heavily import dependent?

A. Suitable salt domes provide inexpensive storage facilities and are located near crude oil distribution centers, refineries, and transportation facilities. Thus, during an embargo, oil stored in salt domes will be readily available to all sections of the country at equitable cost.

Q. How will the military be provided for in the event of another embargo?

A. Of the 1.3 billion barrels of petroleum emergency storage capacity, 300 million barrels will be reserved for national defense needs in case of an emergency.

Q. Won't petroleum for storage have to be purchased from high priced foreign oil?

A. No. We will not purchase significant quantities of oil for at least a couple of years, at which time prices may have broken. In addition, our strategic reserves will be partially filled from domestic sources.

Q. Will we store all the oil in salt domes, or will some be stored in conventional tanks?

A. The type of storage facility, location and the mix of crude oil and product to be stored will be determined in a report to Congress one year after enactment of the Strategic Reserve Bill. However, preliminary studies indicate that crude oil will comprise the majority of the reserve and will be stored in salt domes, although there will probably be selected product storage in steel tanks.

STANDBY AUTHORITY

Q. What kind of standby authority are you asking for?

A. The main features of the proposed legislation to deal with emergency situations are:

—to allocate and control the price of domestic oil;
—to ration end use of energy directly if necessary;
—to implement energy conservation programs;
—to increase domestic oil production and allocate supplies of critical materials;
—to regulate and control petroleum inventories.

This legislation will also contain authority for the U.S. to comply with the International Energy Program requiring international sharing of oil in times of emergency.

Q. Why are you asking Congress for standby energy emergency authorities?

A. In an emergency situation, such as an embargo, the President should have the authority to act quickly and effectively to minimize the impact on this country. Furthermore, standby conservation authority is one of the requirements of the International Energy Plan. I must emphasize, however, that this is "standby" authority to be activated only in a time of crisis.

LONG-TERM ACTIONS

RESEARCH AND DEVELOPMENT

Q. What are you doing about solar energy development?

A. Federal funding for solar energy R&D has climbed from approximately $3 million in FY 1972 to approximately $50 million in FY 1975. The recently enacted Solar Heating and Cooling Demonstration Act of 1974 provides an additional $60 million over five years for developing and demonstrating solar

heating and cooling technology. Planning is well underway to implement this program. The Solar Research and Development Act which was also just recently enacted authorizes another $75 million in FY 1976 for solar energy R&D. The Administration is continuing to review the requirements of the program to determine the appropriate level of funding that can be usefully spent over the next five years to develop solar energy technology.

Q. What are your specific proposals with regard to increasing nuclear R&D?

A. Nuclear energy holds great promise in satisfying our energy demand. Unfortunately, it now accounts for only 1 percent of our energy needs due to technical problems, construction delays, and other bottlenecks which have slowed its progress. We are markedly increasing the budget appropriation for nuclear waste disposal and for continued improvements in safeguards.

Q. Will your Synthetic Fuels Commercialization Program encourage oil shale development at the expense of the environment?

A. No. The program could lessen environmental impacts if we can learn to commercialize cleaner types of production, such as in-situ processing of oil shale. In addition, one of the important purposes of this program will be to investigate and determine the environmental problems associated with synthetic fuels development and to identify the solutions.

Only when we have developed commercially useable technologies which are environmentally acceptable will we proceed to the final step of full commercial implementation.

Q. Many environmentalists are concerned about the development and use of the nuclear breeder reactor—what is the Administration's position on this issue?

A. We have continued support of an expanded R&D program for breeder reactors and will spend over

$500 million in FY 76 to answer some of these questions.

All projections indicate that nuclear power will become an increasingly important source of electric power generation. However, for such growth to occur, nuclear fuel will need to be readily available, for our supply of economically available domestic nuclear fuel is limited. Thus, we must supplement this domestic supply by developing other supply sources.

The breeder reactor is one such supply source. Other sources of nuclear fuel and other methods for nuclear power generation are also being investigated.

Q. What role will ERDA play in achieving these goals?

A. ERDA's mission is to develop ways of using solar energy, geothermal energy, nuclear power, coal gasification and other new or undeveloped energy sources and will play a major role in achieving our long-term goals.

ECONOMIC IMPACT

Q. What impact will be made on the Federal budget by those programs proposed within the energy message?

A. There will be very small budget impacts in FY 75. In FY 76 these programs could increase Federal obligations by 100-200 million dollars, mostly for conservation and facility siting programs, but of course those are more than offset by the revenues raised by the conservation tax measures.

The emergency storage program will be financed from a special fund which will utilize revenues from Naval Petroleum Reserve production.

Q. The Administration expects prices of energy and energy-intensive goods to rise, and plans to offset the impact by reducing income taxes. Won't this affect individuals and income groups differently? Will low-income households tend to be affected more?

How does the Administration plan to assist low-income households?

A. Individuals and income groups will be affected differently by these proposals. What we can do and are doing is to provide a level of tax relief that will stimulate the entire economy for the benefit of all citizens. These tax cuts proposed by the Administration will provide relief to low-income households. In addition a rebate of $80 per adult will be provided to individuals whose incomes are so low that they do not pay taxes.

Q. What are the long run and short run effects of the President's program on the regional costs of energy?

A. While there will be some significant fuel price increases in the Northeast, the uneven regional effects will be dealt with through the existing cost equalization program and lower product import fees. In the longer term, regional effects will be handled by decontrolling the price of crude oil and thus eliminating any petroleum price differentials.

Q. What will the effects of the program be on the economy in terms of inflation and recession?

A. This program contains the balancing elements essential to meet the problems inherent in the existing economic environment. It will reduce our balance of payments, increase domestic resource development, and encourage recognition of the need for energy conservation and the fact that energy is no longer abundant. This program will produce higher prices in the short run which will result in a one-time increase in inflation, but will prepare us for dealing with future energy disruptions which could be devastating to our economy.

Q. How much will all your programs increase the average family's bills in a year?

A. This program is estimated to increase the average middle-income family's energy budget by about $250 in 1975.

Q. What will be the effect of this program on the dollar outflow for oil?

A. The United States spent $2.7 billion on petroleum imports in 1970. This dollar outflow rose to $23.6 billion in 1974. If no new actions are initiated, we estimate the petroleum revenue outflow to reach $32.1 billion in 1977 and $32.4 billion in 1985. With this program, we estimate outflows to be $21.3 billion in 1977 and $12.0 billion in 1985.

INTERNATIONAL

Q. How do you expect the OPEC producing countries to react to your energy program?

A. Most of the OPEC governments have urged on several occasions that the U.S. and other consumer countries adopt policies to encourage conservation and more rational energy use. Many of them have also suggested that the industrial countries accelerate the development of alternative energy sources to reduce demands on their non-renewable petroleum reserves. We believe these features of the President's program will be viewed favorably by the producing countries as well as by other importing countries.

Q. Will we get any North Sea oil? Mexican oil?

A. While the United States will strive to achieve energy independence, we will still have to import some oil and will try to import from relatively secure sources. We will pursue negotiations with Mexico and with North Sea oil producers to add imports from these areas.

Q. Regarding Canada's decision to phase out exporting crude to the U.S., what effect will this have on the U.S., particularly on the Upper Midwest supply and demand situation?

A. Domestic refiners in the upper Midwest will be obliged to obtain their crude oil from alternate

sources. This will probably require the construction or expansion of pipeline capacity. Marketers in this region may be able to obtain refined products from Canada should a crude shortfall develop in the interim. Demand will be unaffected unless a severe product shortage arises, with its attendant gasoline lines and other inconveniences. Careful planning and timing should enable the change in supply patterns to take place with a minimum of disruptions in product availability or price.

GENERAL

Q. Do you believe that the National Environmental Policy Act (NEPA) is a hindrance to the development of domestic energy production?

A. No, I do not. NEPA was promulgated to insure that environmental concerns were considered in Government decision making. Because of this new, major consideration, decision making will in many instances take more time and require more detailed review than was required in the past. However, this process should ensure that the energy projects selected will maintain the quality of the environment.

Q. What would be the projected profit picture for the oil industry this year if a windfall profits tax were enacted? If one were not enacted?

A. Either way, we estimate that profits will be relatively constant this year. If we maintain price controls but do not enact a windfall profits tax, we can expect industry profits to remain stable. If we decontrol old oil and enact a tax, we can expect a small decrease in profits from last year's levels.

Q. What are you going to do about getting New England to build refineries?

A. The Administration intends to encourage refinery construction in all areas of the country and particularly in those in which there is a significant refining

deficit. In New England, for example, it would be beneficial to have refining capability now and particularly if Atlantic OCS production begins. Refineries in that area could offset New England's extensive reliance on product imports and could create jobs.

Q. Why do we say that independence and self-sufficiency can now be attained in 1985 rather than 1980 as was earlier announced by President Nixon?

A. After a thorough review of potential domestic supply and demand for all fuels, on a regional basis, we have concluded that independence by 1980 cannot be attained. The lead-times for exploring and producing oil from new sources and for constructing new facilities is too great to expand domestic supply sufficiently.

Q. How can you propose great increases in resource development when it is a fact that there are acute shortages of materials and equipment throughout the economy?

A. At present, many categories of steel products, plate and tubular goods are in short supply. There is little that can be done to accelerate supply in the next 2-3 years and that is why this program concentrates on reducing demand. Within the 1975-1985 time period, however, new capacity will come on-stream and the problem will be ea ed.

Q. In compiling your energy message, whose statistical data did you rely on—industry or government?

A. Ours. One of the real achievements in the last year was growth in the capability of the Federal government to provide its own energy data. The analyses in this program were developed by the government using its own reporting systems and analytical tools.

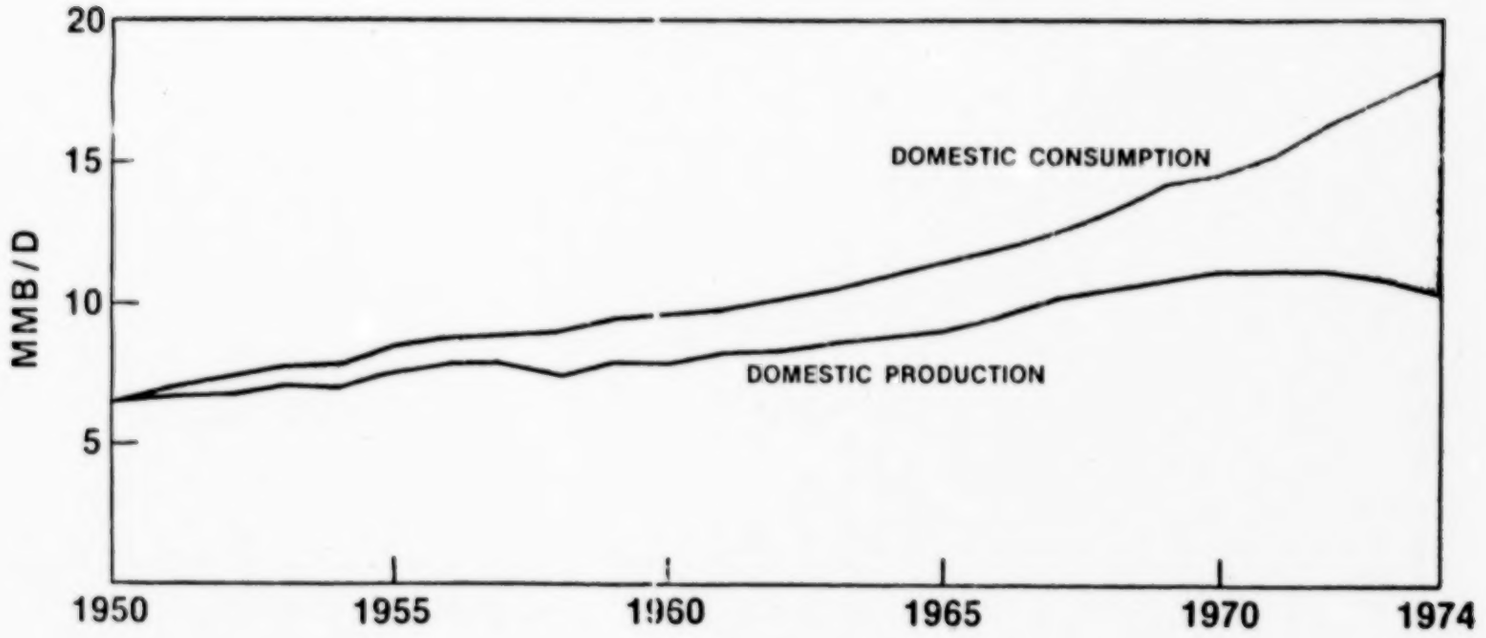
Q. What can the public do to contribute to the success of your program?

A. I am hoping that all Americans will support this program in every way possible. The most significant contribution the average consumer can make is in the area of energy conservation—by installing thermally efficient insulation in their homes, by lowering thermostats, by driving 55 MPH and by driving less. The greatest contributions will come when we all learn how to conserve which is why I have requested an increase of $4 million in the government's public information program. We will try to explain the rationale and effects of this program to all Americans in the next several weeks.

Q. What is the effect of the Trans Alaska Pipeline on domestic supply plans and will it help the situation? Are there any plans to speed up construction? What about a second pipeline?

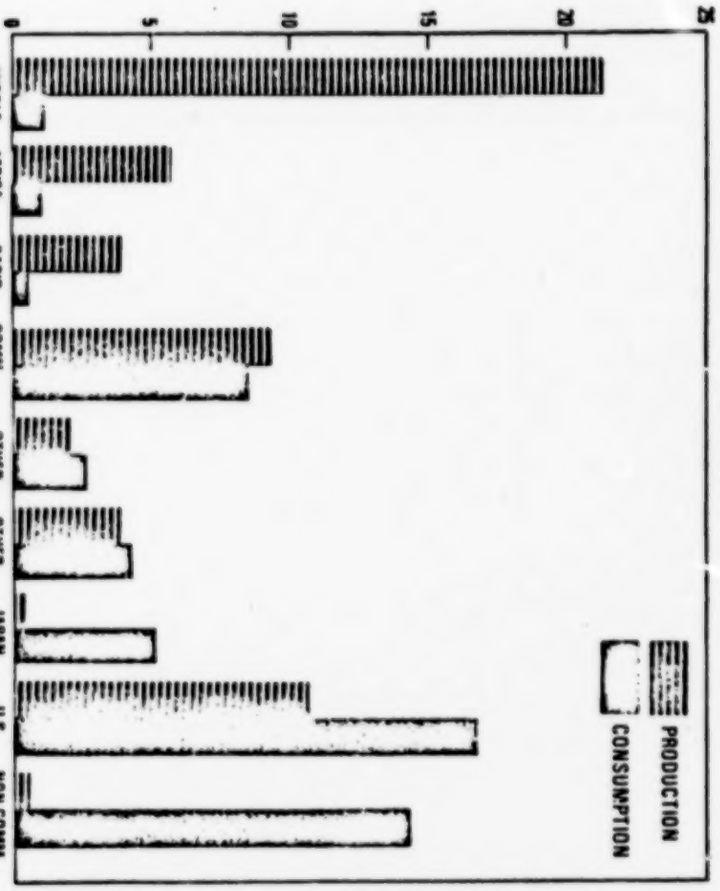
A. The Trans Alaska Pipeline will supply more than 2 MMB/D of domestic crude production, almost 20 percent above current production levels. To assure rapid completion of the pipeline, the Administration has already given priority to its requirements of equipment and materials. A second pipeline could be constructed later if necessary.

PETROLEUM TRENDS



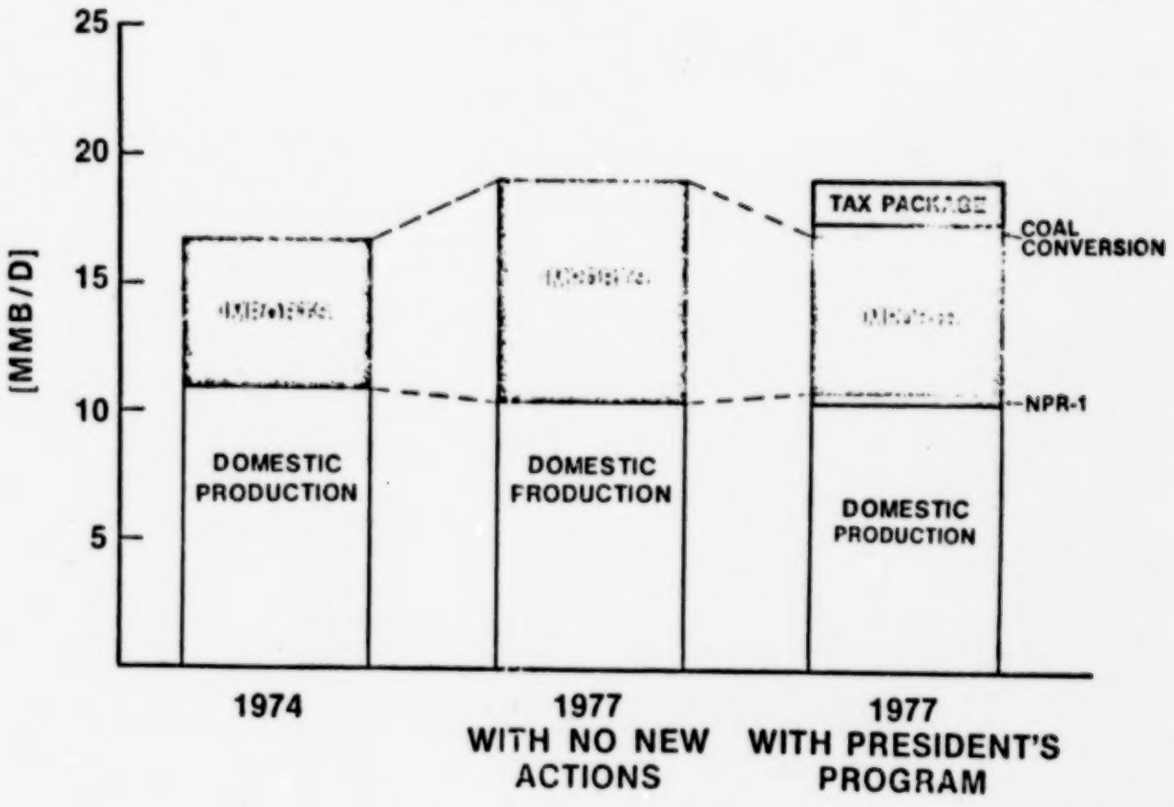
1973 CRUDE PETROLEUM PRODUCTION AND PETROLEUM PRODUCT CONSUMPTION FOR MAJOR PRODUCING AND CONSUMING AREAS

(MMB/D)



(PRODUCTION MINUS CONSUMPTION)

THE PRESIDENT'S SHORT-TERM PROGRAM



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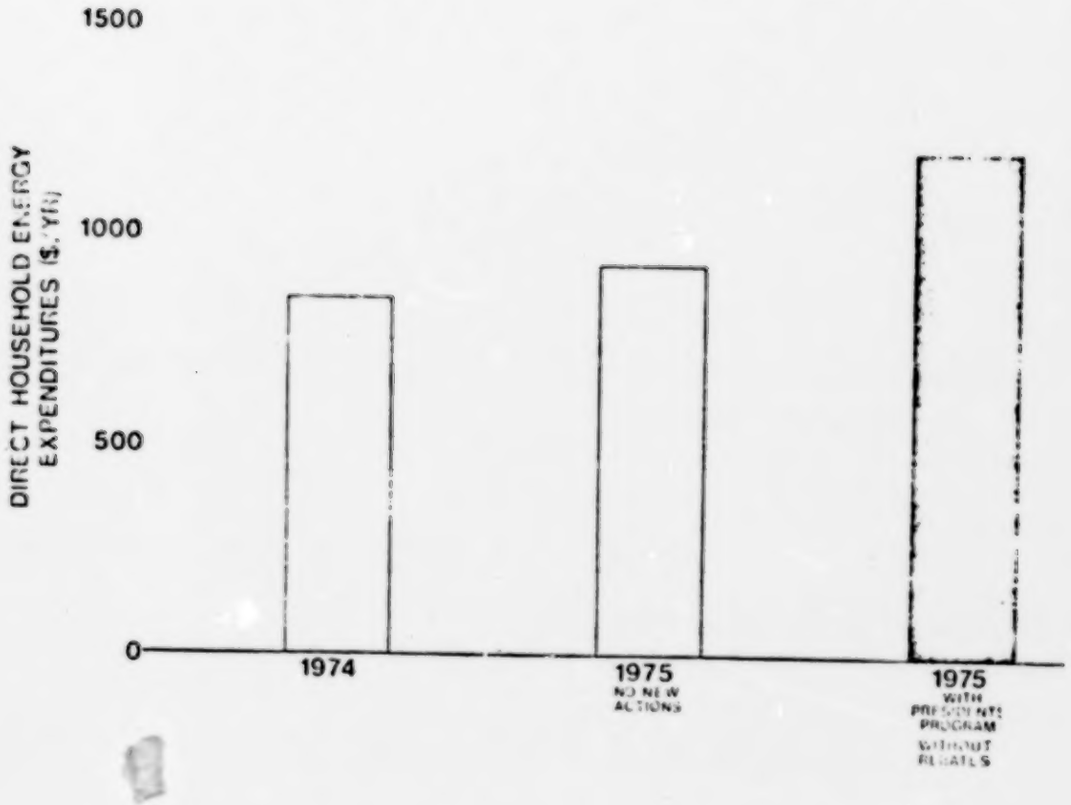
IMPACTS OF SHORT-TERM PROGRAM

	1975 [MMB/D]	1977 [MMB/D]
CONSUMPTION IF NO NEW ACTIONS	18.0	18.3
IMPORTS IF NO NEW ACTIONS	6.5	8.0
	IMPORT SAVINGS	
LESS SAVINGS BY SHORT-TERM ACTIONS:	1975 [MMB/D]	1977 [MMB/D]
PRODUCTION FROM ELK HILLS	0.2	0.3
COAL CONVERSION	0.1	0.3
TAX PACKAGE	0.9	1.6
TOTAL IMPORT SAVINGS	1.2	2.2
REMAINING IMPORTS	5.3	5.8

321

PRICE EFFECTS OF PROGRAM



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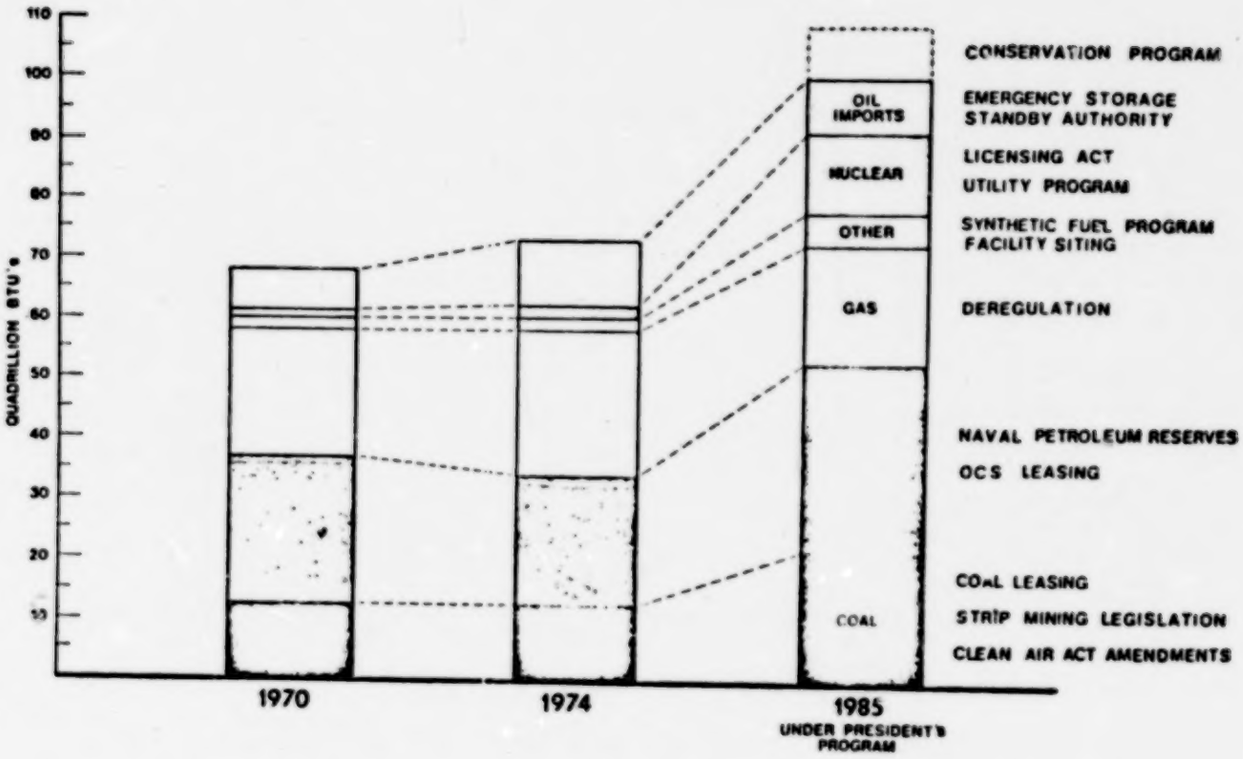
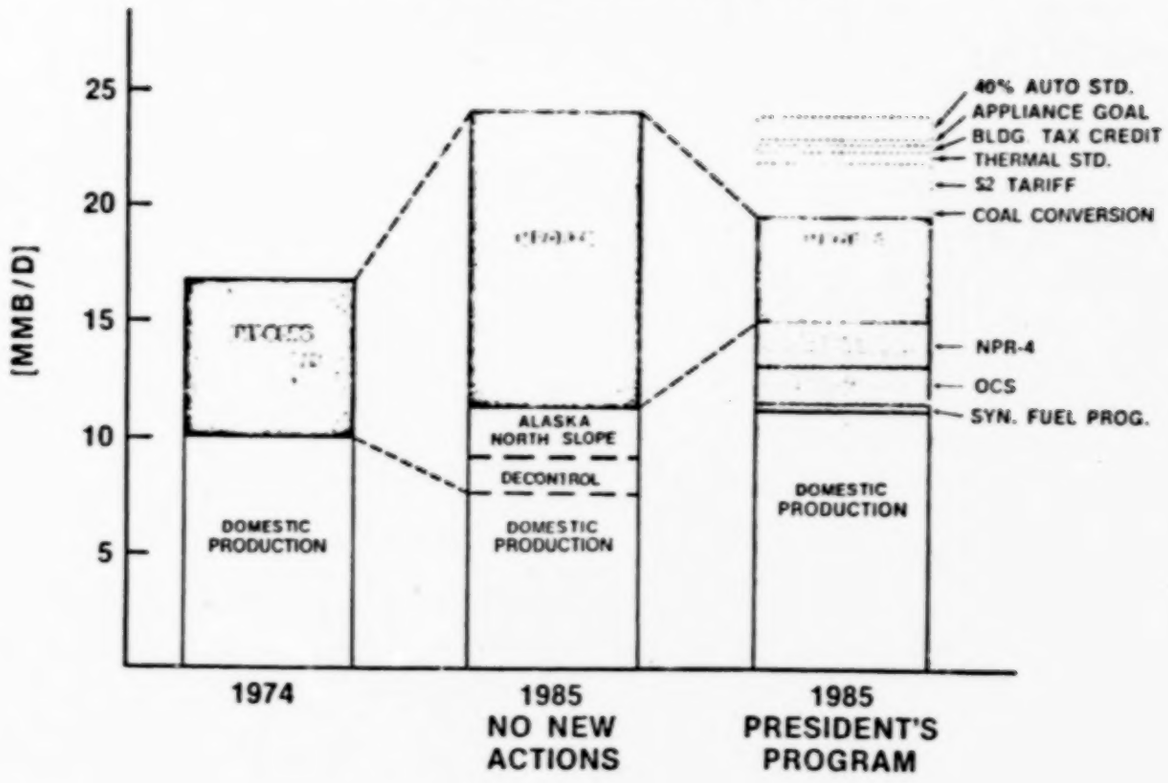
ACTIONS TO BECOME INDEPENDENT



323

IMPACT OF THE PRESIDENT'S PROGRAMS ON PETROLEUM IMPORTS



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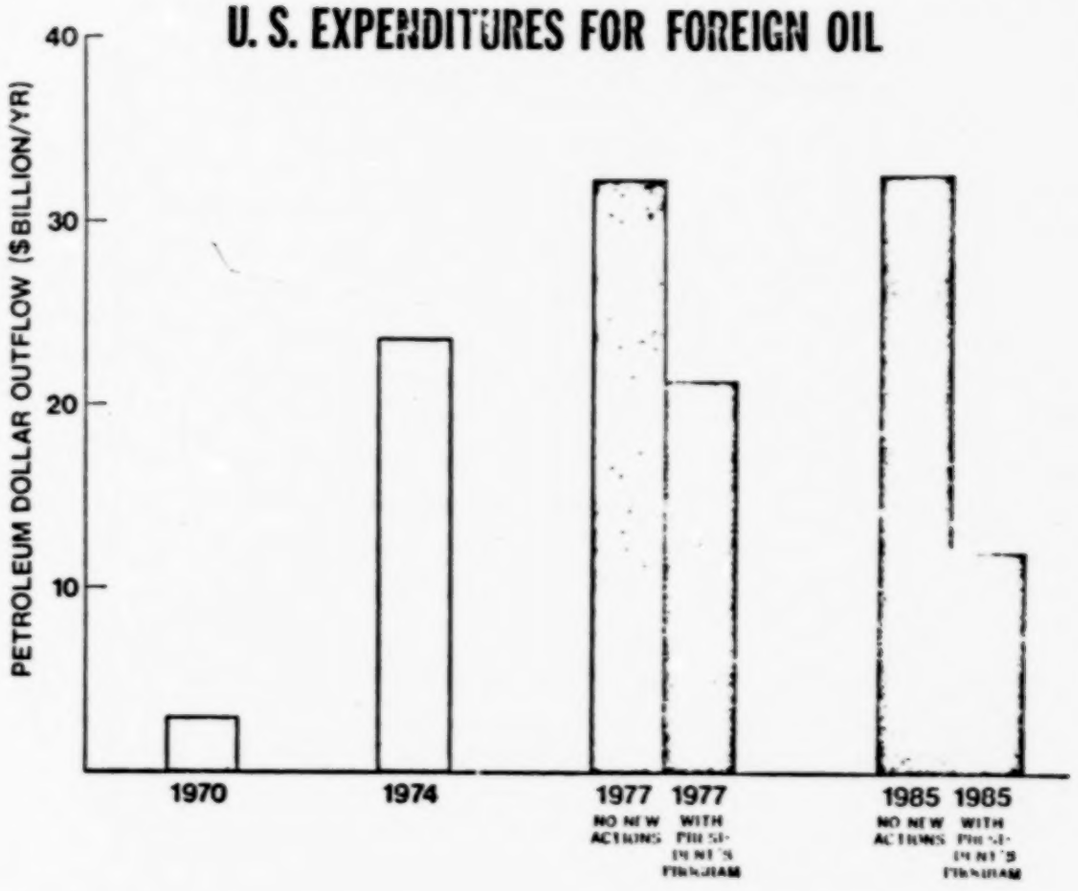
U. S. EXPENDITURES FOR FOREIGN OIL



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EFFECTS OF MID-TERM PROGRAM
(1985)

DEMAND WITH NO NEW ACTIONS	23.9 MMB/D	
IMPORTS WITH NO NEW ACTIONS	12.7 MMB/D	
LESS SAVINGS ACHIEVED BY FOLLOWING ACTIONS:		1985 IMPACT ON IMPORTS [MMB/D]
OCS LEASING		1.5
NPR-4 DEVELOPMENT		2.0
COAL CONVERSION		0.4
SYNTHETIC FUEL COMMERCIALIZATION		0.3
AUTO EFFICIENCY STANDARDS		1.0
CONTINUATION OF TAXES		2.1
APPLIANCE EFFICIENCY GOALS		0.1
INSULATION TAX CREDIT		0.3
THERMAL STANDARDS		0.3
TOTAL IMPORT SAVINGS BY ACTIONS		8.0
REMAINING IMPORTS	4.7	
LESS:		
EMERGENCY STORAGE		3.0
STANDBY AUTHORITIES		1.7
NET IMPORT VULNERABILITY	0	

Related FEA Regulatory Programs

A. *STATUTORY BASIS FOR REGULATION*

1. The import fees imposed by Proclamation No. 4341 are integrally related to FEA's Mandatory Petroleum Allocation and Price Regulations. The principal source of FEA's authority to allocate and to regulate prices of crude oil and refined petroleum products is the Emergency Petroleum Allocation Act of 1973 (the "EPAA"), P.L. 93-159, as amended, 15 U.S.C. §§ 751, *et seq.*, which became law on November 27, 1973, as the United States was entering a period of extreme shortages and rapidly escalating prices of crude oil on the world market. The Act provides, in Section 4(a), that

> "[n]ot later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) such regulation and at prices specified in (or determined in a manner prescribed by) such regulation."

The authority given the President by this section has been delegated to FEA by Executive Order 11790. (29 F.R. 23185, June 27, 1974.)

2. In Section 4(b)(1) of the EPAA, Congress specified as some of the pertinent objectives which must be met, "to the maximum extent practicable," in any allocation and pricing program promulgated under Section 4(a), the following:

> "(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, non-branded independent marketers, and branded independent marketers;

"(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions of the United States and sectors of the petroleum industry, including independent refiners, small refiners, non-branded independent marketers, branded independent marketers, and among all users;

• • • •

"(H) economic efficiency; and

"(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms."

For carrying out these goals, FEA has established a complex regulatory program, the relevant components of which are briefly described in the paragraphs that follow.

B. *THE "TWO-TIER" PRICING SYSTEM*

1. During the summer of 1973, the OPEC members, by concerted action, raised their oil prices substantially above previous levels. Since the United States had grown increasingly reliant on foreign crude oil due largely to a leveling off of domestic production in the face of rapidly increasing demand, current levels of supply were maintained by accepting these new price increases. Thus, in August 1973, when the Cost of Living Council devised a system of price controls for the petroleum industry, it concluded that, while most domestically-produced crude oil had to be subjected to ceiling price controls to minimize as much as possible the inflationary impact of worldwide oil price increases, certain domestically-produced crude oil had to be exempted from ceiling prices to encourage long run domestic production.

2. The so-called "two-tier" price system for domestic crude oil, promulgated by the Council on August 19, 1973, as part of the Phase IV petroleum price regulations (6 C.F.R. § 150, Subpart L) and subsequently adopted on January 14, 1974, as 10 C.F.R. Part 212, Subpart D, of the FEA Mandatory Petroleum Allocation and Price Regulations, imposed a lawful ceiling price

on domestic crude oil produced from a given property when production is at or below the level of production from the same property in the same month of 1972. This price-controlled oil is commonly called "old" oil. The ceiling price on old oil is the May 15, 1973, posted price for crude oil produced from the same field plus $1.35, or about $5.25 per barrel on the average. Crude oil produced in excess of 1972 production levels from the same property (*i.e.*, "new" oil) is exempt from price controls, and each barrel of new oil produced from a given property also releases one barrel of old oil from the same property from price controls (*i.e.*, "released" oil). Thus, for example, if a particular property produced 100 barrels per day in 1972 and 110 barrels per day in 1974, 90 barrels would have to be sold at the FEA imposed ceiling price, and 20 barrels (10 barrels of "new" oil plus 10 barrels of "released" oil) could be sold at the free market price. Also exempted from price controls were: (1) by Congress in the Allocation Act, the first sale of crude oil produced from "stripper" wells (*i.e.*, wells which produce less than 10 barrels per day) and, (2) by FEA in its regulations, the first sale into U.S. commerce of imported crude oil and petroleum products.

3. Crude oil prices are significant at the producer level because FEA regulations permit refiners and resellers at all levels of distribution to pass through increased crude oil and product costs, on a dollar-for-dollar basis, in their sales of refined products. Under the price rules, both refiners and resellers may charge up to their May 15, 1973, prices on a given refined product purchased refined products. In other words, a refiner's or reseller's prices can reflect its current weighted average crude oil or product costs, plus the per unit gross profit it earned on the sale of such products on May 15, 1973. Even though May 1973 profit margins may vary only slightly from firm to firm, the two-tier pricing system on crude oil could still cause wide variaitons in the weighted average crude oil costs among refiners, depending upon their relative access to price-controlled "old oil," since refiners and resellers could pass those wide variances downstream through the distribution system to ultimate consumers.

C. *THE "OLD OIL ALLOCATION PROGRAM"*

1. To equitably distribute the costs of petroleum products, the FEA implemented its "Old Oil Allocation" Program. Prior to 1973, the relative cost of imported crude oil was slightly less than the cost of crude oil of the same quality produced domestically. As a result of the changing world market conditions in 1973 described above, the cost of imported oil shot upward, while the cost of domestic old oil rose only slightly because of the Cost of Living Council's and FEA's price regulations. The increase in foreign crude prices has increased domestic prices on new, released and stripper well oil to a current price in excess of $10.00 per barrel, as compared with an August 1973 price of approximately $5.00. With a growing differential between the ceiling price for old oil and free market prices for stripper, new, released and imported oil, the uneven distribution of old oil among refiners and among regions of the country (particularly as it affected certain small and independent refiners and certain regions, such as the Northeast United States, which are historically reliant on imported oil) began to be reflected in significant price differences among refiners and among regions. In short, the two-tier crude oil pricing structure, while necessary to minimize the inflationary impact of upward spiralling crude oil prices and to maintaining incentives for domestic production, was nevertheless creating economic distortions which were inconsistent with the Congressional objectives enumerated in § 4(b)(1) of the EPAA.

2. Accordingly, FEA instituted a program for the equitable allocation of the benefits of price-controlled old crude oil among domestic refiners and among the various geographic regions of the country. This program, which has come to be known as the "Old Oil Allocation Program," or the "Entitlements" program, can be briefly described as follows:

a. *Crude Oil.* Under the Old Oil Allocation Program, which may be found at 10 C.F.R. 211.67, the equitable allocation of price-controlled old oil is achieved through the issuance of "entitlements" to refine old oil. An "entitlement" is defined as the right of a refiner to refine one barrel of old oil. Each month each refiner is issued a number of entitlements equal to its proportionate share of the total old oil supply. This share is based upon FEA's monthly computation of an "adjusted national old oil supply ratio" or the proportion of old oil to all crude oil, run in domestic refineries. Thus, for example, if the "adjusted national old oil supply ratio" were 40 percent, each refiner would receive a number of entitlements equal to 40 percent of the number of barrels of crude oil run in its refinery, or 0.4 of an entitlement for each barrel of crude oil run during that month. A refiner running a greater volume of old oil than the volume for which it has been issued entitlements is required to purchase entitlements equal to the difference from another refiner (or "eligible firm", as defined below) that has more entitlements than necessary to cover the old oil run during that month. And, a refiner running less old oil than it has entitlements to run is required to sell its excess entitlements.

b. *Imported Products.* FEA concluded that it would be inequitable to address the problem of disproportionately high product costs of refiners and marketers dependent upon foreign crude oil but ignore the plight of those marketers and their customers who purchase finished petroleum products from foreign or offshore refiners, also at world market prices. Moreover, the goal of insuring the sale of refined products at equitable prices among all regions would not have been met by a cost equalization program which ignored the fact that certain regions are more heavily dependent than others on imports of finished products. See EPAA, § 4(b)(1)(F). Accordingly, a limited number of "eligible firms" (including refiners) which import residual fuel oil and No. 2 heating oil (which includes No. 2-D diesel fuel) were also made eligible to receive entitlements based on the volume of such products imported. These entitlements may be sold to refiners that need them. The eligible products, residual fuel oil and No. 2 oil, were chosen because they account for the major portion of finished product imported into the United

States, and particularly into that portion of the United States most dependent on imported petroleum products—the Northeast.

d. The rules for the issuance of entitlements to importers of residual fuel oil and No. 2 heating oil are somewhat different from the rules applicable to crude oil. Using as a basis the current market differentials between the prices of imported and domestic heating oil (as compared to the differences between the prices of controlled and uncontrolled crude oil), FEA concluded that the entitlement value of a barrel of imported residual fuel oil or No. 2 heating oil should be equivalent to 30 percent of the entitlement value of a barrel of crude oil. Thus, for every barrel of imported residual fuel oil or No. 2 heating oil an eligible firm imports, entitlements will be issued with a value equivalent to 30 percent of the value of an entitlement issued on a barrel of crude oil for the month concerned. For example, in November 1974, the adjusted national old oil supply ratio was approximately 40 percent and the value of an entitlement about $5.00; hence, each refiner would receive 40 percent of an entitlement, or $2.00, for each barrel of crude oil included in its runs while each barrel of eligible finished product imported by an eligible firm would receive 30 percent of this entitlement value, or $0.60 ($2.00 x .30). It is estimated that entitlements for imported No. 2 heating oil during November 1974 translated into a value of approximately 1.5 cents per gallon.

THE IMPACT OF THE PRESIDENT'S PROPOSED ENERGY AND ECONOMICS PROGRAM ON NET ENERGY COSTS TO CONSUMERS

I. INTRODUCTION

This paper summarizes the major effects of the President's energy program upon consumer costs. The major elements of the program are:

—A $2 per barrel import fee of petroleum.
—A $2 per barrel excise tax on domestic petroleum production and a 37¢ per thousand cubic feet (Mcf) excise tax on domestic natural gas.
—Decontrol of domestic petroleum prices and the deregulation of new natural gas prices.
—A windfall profits tax on all domestic petroleum production that is designed to absorb all the profits that would otherwise flow from decontrolilng oil prices, plus an additional $3 billion. This tax does not itself cause price increases but it recaptures the profits from price increases otherwise induced.
—A rebate to consumers of the energy fees and taxes that are collected.

The effect of these actions, with the exception of the excess profits tax, is (1) to increase the price of petroleum products by about $4 per barrel (about 10¢ per gallon) if all increased costs are passed through to the consumer and (2) to at least partially offset these price increases with the tax rebates.

This paper presents the impacts of the President's proposed program on consumer energy bills by region, type of energy product, and income class. The effect of the program on the Consumer Price Index (CPI) is estimated as an indication of the total increase in consumer costs. The estimated effect on the CPI is important because it includes higher consumer costs associated with both direct consumer purchases of energy and indirect purchases of energy.

II. DIRECT ENERGY COSTS

The impact of the President's program on the cost of direct energy purchases by households has been estimated for each type of fuel used. Table 1 presents expenditures by fuel type without the program and the estimated impact of the energy program on these expenditures.

Table 1

Impact of the President's Energy Program on Direct Energy Expenditures for 1975 ($ per year per household)

	Energy Costs Without the Program	Energy Costs With the Program	Increases Due to Program	
Gasoline & Motor Oil	$572	$ 681	$109	19%
Heating Oil	69	88	19	27
Natural Gas	100	130	30	32
Electricity	228	241	13	6
Total	$969	$1140	$171	18%

The estimates in Table 1 were derived as follows:

Gasoline. Consumption estimates without the program have been derived from a Bureau of Labor Statistics (BLS) survey of gasoline use by region. These were aggregated and divided by the total number of households (70 million) to give consumption per household. The current average price of gasoline is approximately 52¢ per gallon. An increase of 10¢ per gallon to 62¢ per gallon represents a 19 percent increase in the price of gasoline. Hence a 19 percent increase in gasoline and motor oil to $681 per household per year. Moreover, this increase in costs due to the program is an overstatement in that it is assumed that there is no short run response to the increased prices and hence that there is no reduction in consumption.

Heating Oil. Consumption estimates were obtained from a BLS survey in the same manner as for gasoline.

The current average price of heating oil is approximately 37¢ per gallon. An increase of 10¢ per gallon to 47¢ per gallon represents a 27 percent increase in the price of heating oil. This 27 percent increase in heating oil prices increases energy costs for heating oil to $83 per household per year. A small amount of residual fuel oil is also used by households. This quantity (about $6 per year per household) was obtained from the BLS survey and included in the heating oil estimates.

Natural Gas. The quantities and prices for natural gas were obtained from analyses that are being performed by the Office of Economic Impact, the Federal Energy Administration. The increase in the average price of natural gas is estimated to be 37¢ per Mcf for intrastate gas and 43¢ per Mcf for interstate gas. Interstate sales of natural gas are currently regulated (by the Federal Power Commission) whereas intrastate sales are not. The excise tax of 37¢ Mcf is levied on all gas. The average price of interstate gas should increase 6¢ per Mcf because of the deregulation of new gas.

Electricity. Electricity cost increase were estimated by the Office of Data, the Federal Energy Administration. These estimates account for the effects of increased fuel costs and do not consider the effects of higher rates of return or accounting practices that would effectively raise utility costs.

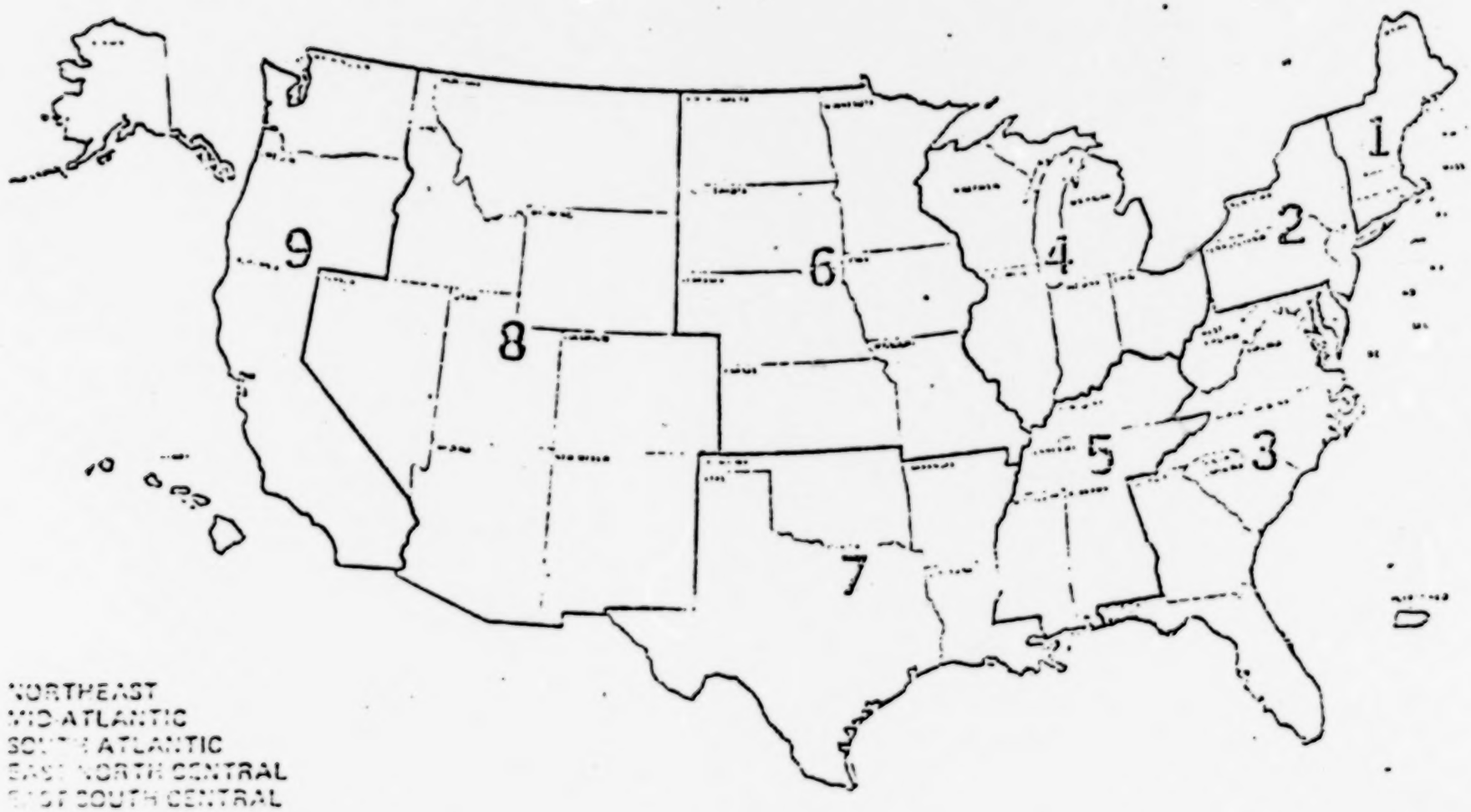
Regional Impacts

The regional impacts of the President's program upon household energy costs are shown in Table 2. These data were all derived from the same sources as the data in Table 1 and were calculated by dividing the total regional energy cost increase by the number of households in each region.

Table 2 illustrates that the New England, West North Central, West South Central, and Mountain areas have the greatest relative impact. In all of these areas, except New England, the primary cause of the large increase is gasoline prices. In New England the major factor is heating oil.

PROJECT INDEPENDENCE EVALUATION REGIONS

CENSUS REGIONS



1. NORTHEAST
2. MID-ATLANTIC
3. SOUTH ATLANTIC
4. EAST NORTH CENTRAL
5. EAST SOUTH CENTRAL
6. WEST NORTH CENTRAL
7. WEST SOUTH CENTRAL
8. MOUNTAIN
9. PACIFIC

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Table 2

Regional Distribution of the Increased Direct Energy Expenditures Per Household

	Gasoline & Motor Oil	Heating Oil	Natural Gas	Electricity	Total
New England	$ 95	$56	$14	$15	$180
Middle Atlantic	83	54	24	9	170
East North Central	107	19	44	4	174
West North Central	126	13	36	12	187
South Atlantic	118	10	14	12	154
East South Central	116	2	19	5	142
West South Central	116	0	27	42	185
Mountain	141	3	37	10	191
Pacific	102	3	30	16	151
Total U.S.	$109	$19	$30	$13	$171

Income Distribution Effects

Tables 3, 4, and 5 give estimates of the effect of the energy program on different income classes. With the exception of the tax rebate data these statistics were obtained from analyses done by the Washington Center for Metropolitan Studies and are totally independent of the estimates made for the aggregate and regional impacts in Tables 1 and 2. However, close examination and comparison of Table 1 with Table 3 shows that the data are consistent. Specifically, the median income of families in 1972 was about $11,000. Assuming that inflation has raised this to $13,000 the $969 total energy bill given in Table 1 is bracketed by the $742 and $1085 bills given in Table 3 for the energy costs of the lower midle and upper middle income classes. The other numbers in Table 3 are roughly consistent with Table 1.

Tables 3 and 4 illustrate that low income groups spend a larger proportion of their income on direct energy purchases than higher income groups. These tables also show that the tax rebate slightly offset the average increase in energy costs of the poor and the

upper middle income class, significantly offsets the average cost of the lower middle income group and falls short of meeting the higher costs of the well-off group by $50.

Table 3

Current Energy Costs Without the President's Program [a]

	Poor Average $2,500	Lower Middle Average $8,000	Upper Middle Average $14,000	Well-Off Average $24,500
Gasoline	$140	$349	$ 627	$ 736
Heating Oil	66	66	66	83
Natural Gas	91	108	117	140
Electricity	160	203	259	319
Coal	16	16	16	16
Total	$473	$742	$1085	$1294
% of Average Income	18.9%	9.3%	7.8%	5.3%

[a] Source: WCMS Survey for 1972-1973, adjusted for price increases to September 1974.

Table 4

Energy Costs with President's Program [a]

	Poor	Lower Middle	Upper Middle	Well-Off
Gasoline	$166	$415	$ 746	$ 876
Heating Oil	83	83	83	105
Natural Gas	120	142	154	184
Electricity	170	215	275	338
Coal	16	16	16	16
Total	$555	$871	$1274	$1519
% of Average Income	22.2%	10.9%	9.1%	6.2%

[a] Estimated by applying percent price increases for each type of energy from Table 1 to the energy costs in Table 3.

Table 5

Net Energy Costs of President's Program

	Poor	Lower Middle	Upper Middle	Well-Off
Average Increase in Energy Costs	$ 82	$129	$ 189	$ 225
Average Rebate	97	311	253	183
Net Energy Costs	458	560	1021	1336
% of Average Income	18.3%	7.0%	7.3%	5.5%

III. TOTAL ENERGY COSTS

The total price impact of the President's energy program will extend beyond the direct energy purchases to any non-energy products or services that require significant amounts of energy in their production. Chemicals, metal and food products are examples of areas in which the indirect or ripple energy price effects will occur in varying degrees.

The indirect price effects are uncertain and are difficult to forecast. Most price models that measure and forecast these effects depend on historical experience to estimate the responses of various markets to changes in the costs of inputs. The models attempt to capture the extent that costs are passed on to purchasers and the extent that profit margins are adjusted up or down.

The approach used by the Federal Energy Administration to forecast the indirect price effects of the President's program was to use a stage-of-processing model developed by Data Resource Incorporated (DRI) to forecast the overall rise in the Consumer Price Index (CPI) and to use this estimate to derive total increased consumer costs. The indirect costs are then calculated as the difference between the direct and total cost estimates.

A modified version of the DRI stage-of-processing model was used to forecast the effect that energy price changes have upon the CPI and components of the CPI. The model requires two inputs: (1) forecasts of whole-

sale energy prices and (2) forecasts of the general wholesale and retail price indices prior to energy price changes. Price information is combined with historical information on the relationship between the stages-of-processing to forecast the effects that energy price changes will have on the prices of crude wholesale goods, intermediate wholesale goods, finished wholesale products, and finally retail consumer goods and services.

Using the methodology described above it is estimated that the CPI will increase 2.0% during the first full year of the program. Given a normal unencumbered economy the CPI would rise an estimated 2.5 percentage points during the first full year of the program in addition to the normally expected rise; and there will be small increases of 0.3 and 0.2 percentage points in the second and third years. These estimated increases tend to overestimate the effect of the program for two reasons: First the energy price increases that were used as inputs to the model assumes a full pass through of the taxes and import fees. It is unlikely that this will occur because of the tax rebates to industry and because the economy is generally weak. This excess supply would result if industry attempts to pass through all of the costs. (Only if demand is totally nonresponsive to price changes would firms and businesses be able to pass all of the increases to consumers.) Secondly, the stage-of-processing model is based upon historical mark-up relationships and these may not hold because of the currently poor market demand conditions. That is, demand is currently at such a low level that companies may not be willing to pass on increased costs for fear of further reducing their markets.

For a 2.0 percent CPI increase the total and indirect costs per household would be $275 and $104 respectively. Table 6 summarizes the steps taken to make these estimates.

Table 6

Estimated Total and Indirect Consumer Costs

1. Estimated Personal Consumption Per Household
   - a. Estimated 1975 Personal Consumption = $966.8 Billion [a]
   - b. Estimated Number of Households = 70 million
   - c. Consumption per Household = $13,810
2. Estimated Costs (per household per year)

	Total [b]	Indirect [c]
High Estimate	$345	$174
Best Estimate	275	104

[a] From DRI Long-Term Forecast.

[b] Estimated at 2.5 percent times $13,810 for high estimate and 2.0 percent times $13,810 for best estimate.

[c] Calculated as total less direct ($171).

This table shows that the total costs are likely to be $275 per household with direct cost being about $171 on average and indirect costs being about $104.

(Caption Omitted)

PLAINTIFFS' MOTION FOR CONSOLIDATION OF HEARINGS ON PRELIMINARY INJUNCTIONS AND MERITS AND FOR ENTRY OF FINDINGS CONCLUSIONS OF LAW AND JUDGMENT

Now come the Plaintiffs in the above two consolidated matters and state that a hearing was held and an order entered on February 21, 1975, denying Plaintiffs' motions for preliminary injunctions.

Plaintiffs move that the Court treat the hearing previously held on February 21, 1975 as a consolidated hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure and thereafter enter a final judgment in this proceeding based on the record of said hearing of February 21, 1975.

In support of their motions, Plaintiffs say that the evidence adduced at the hearing on the preliminary injunctions failed to reveal a conflict of material fact justifying a full trial on the merits.

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Deputy Assistant Attorney General
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Washington, D.C. 20520

Attorney for Defendants

[Caption Omitted]

[Filed March 11, 1975]

ORDER

Upon consideration of the plaintiffs' motion in the above two consolidated cases to treat the preliminary hearing held on February 21, 1975 as a consolidated hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, and to enter a final judgment on the record of said hearing of February 21, 1975, it is hereby

ORDERED, that the plaintiffs' motion to treat the hearing on the preliminary injunction as a consolidated hearing on the merits is granted; and it is further

ORDERED, that the Findings of Fact, Conclusions of Law, and Order of February 21, 1975, shall constitute the Court's final judgment in these cases.

John H. Pratt
JOHN H. PRATT
United States District Judge

March 11, 1975

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1206 SEPTEMBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS AND MICHAEL S. DUKAKIS, GOVERNOR, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

NOTIFICATION OF FILING OF A PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY ADMINISTRATION

General Counsel
Federal Energy Administration
Washington, D.C.

Gentlemen:

You are hereby notifed that the attached is a true copy of the petition for review of an order of the Federal Energy Administration filed in the said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C., on February 27, 1975 in the above-entitled case.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C., this 28th day of February

HUGH E. KLINE,
Clerk

Clerk of the United States Court of Appeals for the District of Columbia Circuit,

By: /s/ Patricia L. Lang
PATRICIA L. LANG
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1206

Filed February 27, 1975

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and

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STATE OF VERMONT AND
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and

STATE OF MINNESOTA AND
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Office of the Attorney General
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PLAINTIFFS

v.

WILLIAM E. SIMON
Secretary of the Treasury of the
United States
Washington, D.C. 20220

and

FRANK G. ZARB
Administrator of the
Federal Energy Administration
Washington, D.C.
DEFENDANTS

PETITION FOR REVIEW

The Commonwealth of Massachusetts, et al hereby petition this Court for review under Section 7(i)(2)(A) of the Federal Energy Administration Act of 1974 P.L. 93-275, May 7, 1974 (15 U.S.C. § 766(i)(2)(A)) of the Federal Energy Administration's "Amendments to Conform Import Regulations to Presidential Proclamation No. 4341", which amended the oil import regulations contained in Parts 206 and 213 of Chapter II, Title 10, Code of Federal Regulations. Specifically, the following Sections were amended: Sections 206.33(c), 206.46, 213.5, 213.7, 213.11, 213.12, 213.4, 213.22(b)(1), 213.22(c), 213.23, 213.25, 213.26, 213.27, 213.28, 213.29(e)(3), 213.30, 213.33, 213.35, 213.9(a), 213.9(b), 213.12(a), 213.12(b), 213.13(b), 213.15(a), 213.15(b), 213.16(a), 213.20(a)(1), 213.20(a)(2), 213.21(a)(1), 213.21(a)(2), 213.21(b)(1), 213.21(b)(2), 213.29(a)(1), 213.30(a)(1), 213.32(a), 213.32(b), 213.32(c), 213.32(d), 213.33(d)(1), 213.36(c)(1), 213.38(c), 213.10(b), 213.11(f)(1), 213.11(f)(2), 213.34(e), and 213.37(c).

These Amendents were issued on January 28, 1975, and published in the Federal Register on January 31, 1975, at 40 Fed. Reg. 4771, et seq.

The Regulations as amended are unlawful since: (1) the issuance of Executive Proclamation No. 4341, January 23, 1975 (40 Fed. Reg. 3965) is not within the scope of the authority granted to the President by 19 U.S.C. § 1862(b), or any other act of Congress, insofar as that

Executive Proclamation, to be implemented by the Amendments to the Regulations, provided for the imposition of license fees payable on imports of petroleum and petroleum products; (2) 19 U.S.C. § 1862(b) requires that as a condition precedent to issuance of said Executive Proclamation, the Secretary of the Treasury hold hearings or afford interested parties an opportunity to present information and advice relevant to the investigation of the effect on national security of oil imports, and make recommendations in respect thereto to the President, and said Secretary failed to act as so required; (3) the Administrator failed to make the analysis required by Section 18 of the Federal Energy Act of 1974 (15 U.S.C. § 777) and, (4) the Administrator did not comply with the requirements of the National Environmental Policy Act (42 U.S.C. 4321 et seq) in that he failed to prepare and make available to the public an environmental impact statement with respect to said regulations.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS, ET AL

By their Attorney

GADSBY & HANNAH

/s/ James S. Hostetler
JAMES S. HOSTETLER
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202-223-9100

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1206 SEPTEMBER TERM, 1974

ALGONQUIN SNG, INC., ET AL, PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

NOTIFICATION OF FILING OF A PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY ADMINISTRATION

General Counsel
Federal Energy Administration
Washington, D.C.

Gentlemen:

You are hereby notified that the attached is a true copy of the petition for review of an order of the Federal Energy Administration filed in the said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C. on February 27, 1975 in the above-entitled case.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C., this 28th day of February

HUGH E. KLINE,
Clerk

Clerk of the United States
Court of Appeals for the
District of Columbia
Circuit,

By: /s/ Patricia L. Lang
PATRICIA L. LANG
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1202

Filed February 27, 1975

ALGONQUIN SNG, INC.
1284 Soldiers Field Road
Boston, Massachusetts 02135
617 254-4050

NEW ENGLAND POWER COMPANY
20 Turnpike Road
Westboro, Massachusetts 01581
617 366-9011

NEW BEDFORD GAS AND EDISON LIGHT COMPANY
693 Purchase Street
New Bedford, Massachusetts 02740
607 996-8211

CAMBRIDGE ELECTRIC LIGHT COMPANY
46 Blackstone Street
Cambridge, Massachusetts 02139
607 661-1600

CANAL ELECTRIC COMPANY
130 Bishop Richard Allen Road
Cambridge, Massachusetts 02139
607 881-1301

MONTAUP ELECTRIC COMPANY
Riverside Avenue
Somerset, Massachusetts 02726
607 678-5283

THE CONNECTICUT LIGHT AND POWER COMPANY
Selden Street
Berlin, Connecticut 06101
203 666-2431

THE HARTFORD ELECTRIC LIGHT COMPANY
176 Cumberland Avenue
Wethersfield, Connecticut 06101
203 249-5711

WESTERN MASSACHUSETTS ELECTRIC COMPANY
174 Brush Hill Avenue
West Springfield, Massachusetts 01089
413 785-5871

HOLYOKE WATER POWER COMPANY
One Canal Street
Holyoke, Massachusetts 01040
413 536-5520

PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

PETITION FOR REVIEW

Algonquin SNG, Inc., et al hereby petition this Court for review under Section 7(i)(2)(A) of the Federal Energy Administration Act of 1974 P.L. 93-275, May 7, 1974 (15 U.S.C. § 766(i)(2)(A)) of the Federal Energy Administration's "Amendments to Conform Import Regulations to Presidential Proclamation No. 4341", which amended the oil import regulations contained in Parts 206 and 213 of Chapter II, Title 10, Code of Federal Regulations. Specifically, the following Sections were amended: Sections 206.33(c), 206.46, 213.5, 213.7, 213.11, 213.12, 213.4, 213.22(b)(1), 213.22(c), 213.23, 213.25, 213.26, 213.27, 213.28, 213.29(e)(3), 213.30, 213.33, 213.35, 213.9(a), 213.9(b), 213.12(a), 213.12(b), 213.13(b), 213.15(a), 213.15(b), 213.16(a), 213.20(a)(1), 213.20(a)(2), 213.21(a)(1), 213.21(a)(2), 213.21(b)(1), 213.21(b)(2), 213.29(a)(1), 213.30(a)(1), 213.32(a), 213.32(b), 213.32(c), 213.32(d), 213.32(d)(1), 213.36(c)(1), 213.38(c), 213.10(b), 213.11(f)(1), 213-.11(f)(2), 213.34(e), and 223.37(c).

These Amendments were issued on January 28, 1975 and published in the Federal Register on January 31, 1975 at 40 Fed. Reg. 4771 et seq.

The Registrations as amended are unlawful since: (1) the issuance of Executive Proclamation No. 4341, January 23, 1975 (40 Fed. Reg. 3965), is not within the scope of the authority granted to the President by 19 U.S.C. § 1862(b) or any other act of Congress, insofar as that Executive Proclamation, to be implemented by the Amendments to the Regulations, provided for the imposition of license fees payable on imports of petroleum and petroleum products; (2) 19 U.S.C. § 1862(b) requires that as a condition precedent to issuance of said Executive Proclamation, the Secretary of the Treasury hold hearings or afford interested parties an opportunity to present information and advice relevant to the investigation of the effect on national security of oil imports, and make recommendations in respect thereto to the President, and said Secretary failed to act as so required and, (3) the Administrator failed to make the analysis required by Section 18 of the Federal Energy Act of 1974 (15 U.S.C. § 777).

Respectfully submitted,

ALGONQUIN SNG, INC.,
ET AL

By their Attorneys

CONNOLE AND O'CONNELL

/s/ William R. Connole
WILLIAM R. CONNOLE
#52845

/s/ Ernest C. Baynard, III
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[Caption Omitted]

[Filed August 15, 1975]

MOTION FOR STAY OF MANDATE PURSUANT TO RULE 41(b) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Appellees and respondents, respectively William Simon, *et al.*, and the Federal Energy Administration (hereinafter "the appellees"), respectfully move this Court pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure for a stay of its mandate in these cases pending appellees' application within 30 days to the Supreme Court for a writ of certiorari; as prescribed by Rule 41(b), in the event a petition for a writ of certiorari is filed within that time, the stay to continue until final disposition by the Supreme Court. The Solicitor General has already authorized the filing of a petition for certiorari. The grounds for this Motion are the following:

1. In its decision, this Court held that Congress did not intend to give the President the power in Section 232 of the Trade Expansion Act of 1962 to impose a license fee on imported oil. The Court's ruling has a far-reaching significance both as to an important statutory provision governing Presidential authority as well as to the President's ability to meet a crisis which all recognize has severely affected the Nation's economy. The importance of the legal issue involved in this proceeding demands a resolution by the Supreme Court.

2. Should the mandate of the Court of Appeals now issue, the public interest will be irreparably harmed. The inability to impose the oil import license fee during the period of Supreme Court review leaves the President without an important instrument for the implementation of his energy policy and thus will allow for the potential for serious economic dislocations during the precarious time. As this Court recognized, the President's imposition of

the import license fee program was "an honest attempt . . . to find a solution to a difficult crisis" which has as its stake "nothing less than our country's economic freedom and survival." [1] (Slip Opinion at 22-23.)

The country at the present time is faced with a period of uncertainty as to the direction of the Government's energy policy. We continue to be vulnerable to the monopolistic oil pricing policies of OPEC. The overall objective of the Government has been and must be to reduce the reliance upon foreign oil. As the attached Affidavit of Eric C. Zausner, Deputy Administrator of the Federal Energy Administration demonstrates, the only realistic tool available to the President during the short term to achieve this objective is the fee device which the Court of Appeals has rejected. Accordingly, it is imperative that this Court issue a stay pending review in order to continue in place an important energy conservation mechanism and to prevent serious economic disclocations from taking hold during the period of that review.

3. The issuance of the Court's mandate at this time has another important effect which supports the granting of appellee's application. As noted, it is unclear at this time what energy policy this Government will ultimately adopt in order to meet the emergency which confronts us. The President and the Congress have advocated different responses to the Nation's energy crisis. This controversy will be resolved shortly after Congress returns from its recess on September 3, 1975. Should the Court's mandate issue immediately, it will unavoidably place the judicial branch in the midst of the political fray. Time should be allowed so that the executive and legislative branches may appropriately determine the direction of the Nation's energy policy. The issu-

[1] Similarly, the district court recognized "[t]he grave necessity of decreasing our dependence on foreign oil, and developing our own domestic industry and alternative sources of energy was and is a matter of primary national importance." (Jt. App. at 288-289.)

ance of a stay will permit further proceedings in the instant case to be conducted without interfering with the ongoing political process.

4. In an effort substantially to mitigate any further potential claims of irreparable injury, the Federal Energy Administration has announced that by direction of the President fee payments due August 31, 1975, for imports made during July may be deferred for payment until September 15, 1975, pending congressional action. *See*, Zausner Affidavit. This action will effectively postpone the imposition of the fee payments pending resolution of the current dispute regarding the proper course of our energy policy. Thus, the President has ordered action designed to alleviate potential injury from the imposition of the fee and at the same time has preserved appropriate short-term options depending upon the outcome of congressional action. Accordingly, this Court should defer to the President's judgment concerning our immediate needs during a period of uncertainty and potential confusion. Thus, the public interest would be served by the issuance of a stay in these cases. *See*, *Yakus* v. *United States*, 321 U.S. 414 (1944), and *Virginian Railroad* v. *Federation*, 300 U.S. 515 (1937).

In sum, the immense legal importance of the issues in this case, their relationship to forthcoming political decisions, and public interest considerations clearly outweigh any claims of irreparable harm which the appellants may suffer. For all of the above reasons, appellees respectfully request that pursuant to Rule 41(b), FRAP, a stay of this Court's mandate be issued pending appellees' application within 30 days for a writ of certiorari to the Supreme Court. Alternatively, should this Court deny that requested relief, appellees request a stay of this Court's mandate for seven days to permit

them to make an application for a stay to the Supreme Court.

Respectfully submitted,

REX E. LEE
Assistant Attorney General

IRWIN GOLDBLOOM
Deputy Assistant
Attorney General

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of Justice
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Avenue, N.W.
Washington, D.C. 20530

AFFIDAVIT OF ERIC R. ZAUSNER

I, Eric R. Zausner, having been duly sworn, hereby depose and state:

1. I am a Deputy Administrator of the Federal Energy Administration ("FEA"), having been duly appointed to that post by the President. In this position and in my previous position as Assistant Administrator for Policy and Analysis, I have played a major role in developing and analyzing the President's comprehensive energy program announced in his State of the Union Address of January 15, 1975 and modifications thereto, including the revised Mandatory Oil Import Program at issue in the present litigation. In addition, I was responsible for the development and management of the *Project Independence Report*, an in-depth analysis of the Nation's energy problems between now and 1985, which FEA submitted to the President in November 1974.

2. In view of the events of the last two years, including the Arab oil embargo, the decline in domestic production of crude oil and the dramatic increases in the price of foreign crude oil and product, the President determined that any substantial delay in tackling the oil import problem will result in increased dependence on imports and make it more difficult and costly to reverse the trend at a later time. Delay also means an additional span of time in which this Nation is subject to international coercion through embargoes and monopolistic price increases by the producing nations. These extreme circumstances are what prompted the President to take immediate action, pursuant to 19 U.S.C. 1862(b), to adjust imports of crude oil and petroleum products through the imposition of a supplemental import fee, so as to reduce our vulnerability to embargoes and similar actions which were found to constitute a threat to the national security. The supplemental fee was intended to be in effect only until a more comprehensive legislative program was enacted, at which time the supplemental fee would be modified or removed.

4. Since February, 1975, the supplemental fee has been applied to imports of crude oil and petroleum products, and the level of these imports has decreased. However, the Congress has not enacted the President's legislative program, announced in the January 15, 1975 State of the Union Message, and this country still imports approximately 36 percent of its petroleum supplies. Accordingly, the current need to reduce our reliance upon imports is as compelling today as it was when the supplemental import fee was initially imposed in February, 1975.

5. The President is today announcing that he will lift the supplemental fee on crude oil and petroleum products (effective July 1, 1975) if his upcoming veto of an extension of price and allocation controls (the Emergency Petroleum Allocation Act of 1973) is sustained.* In addition, FEA today announced, in a Notice to be published in the *Federal Register*, that the supplemental fee payments due on August 31, 1975, may be deferred for 15 days, until September 15, 1975, pending the resolution of the current debate between the President and Congress over the extension of FEA's price and allocation authority. A copy of the Notice is attached as Attachment "A".

6. If decontrol occurs, the President will lift the fee because decontrol, like the fee itself, will achieve the President's objective of demand reduction through increased prices, thereby effectively reducing the amount of crude oil and petroleum products this country must import. It must be emphasized, however, that if controls continue, the current level of import fees will remain a vital part of this Nation's energy policy.

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* The first-tier fees are to remain on imported petroleum regardless of Congressional action on the President's veto. These fees provide a 42 cent per barrel differential between the fees on crude oil and products. This differential was specifically designed to protect and encourage the expansion of domestic refinery capacity in the face of an increasing demand for less expensively refined imported petroleum products whose importation was threatening to impair the national security. The President's ability to impose these fees, therefore, is considered to be essential to his ability to deal with the threat to domestic refining operations posed by the importation of refined products.

7. Prior to the time that President Ford imposed the supplemental import license fee, FEA considered the available options for achieving the primary objectives of reducing dependence on foreign oil and increasing domestic oil production. Of the administrative actions available to the President, the principal alternatives considered were various types of import quota systems and the imposition of a supplemental import fee. It was determined as a result of this analysis that by far the most effective, least disruptive and publicly acceptable mechanism was the imposition of the supplemental fee.

8. This determination was based on a consideration of the following factors, among others. Any effective quota system would create artificial shortages and dislocations, including gas lines, such as those experienced during the last embargo, and could require gasoline rationing. It was considered doubtful whether the public would endure this type of solution over a sustained period in the absence of a more visible national emergency, *e.g.*, another embargo or a war. It was also considered questionable whether the President had adequate authority to implement a rationing program under the Emergency Petroleum Allocation Act. Thus, substantial enforcement problems were envisioned, including the necessity for a vast bureaucracy to administer a vastly expanded allocation program.

9. The supplemental fee system, on the other hand, had several features to recommend it. First, the fee system could make use of the existing price structure and traditional market mechanisms to increase domestic production and reduce the high level of petroleum imports. This approach appeared to be far less disruptive and less of a shock for the public to accept over the long run. This has been demonstrated by the ease with which the supplemental fee program has been put into effect and the lack of serious dislocations or hardships as a result of the implementation of the supplemental fee over the past six months. Second, this approach required very little additional administration and was practically self-enforcing. All of the necessary enforcement machinery was already

in place in the Bureau of Customs and the FEA. Finally, use of the fee system did not involve the Federal government in difficult and often impossible decisions about priorities of uses for and distribution of petroleum products such as that required under any allocation system. Consideration of these factors militated very strongly in favor of recommending the fee system as the only acceptable and effective weapon available to the President.

/s/ Eric R. Zausner
ERIC R. ZAUSNER

Subscribed and sworn to before
me this 15th day of August 1975.

/s/ Thomas H. Kemp
THOMAS H. KEMP
Notary Public

My Commission Expires September 14, 1979.

FEDERAL ENERGY ADMINISTRATION

10 CFR Part 213

Notice of Deferral of Supplemental Fee Payments

Due August 31, 1975

On August 15, 1975, the President announced that he would indefinitely suspend supplemental fees on petroleum imports, effective July 1, 1975, if Congress sustains his veto of the bill extending the Emergency Petroleum Allocation Act. In light of this announcement, the Federal Energy Administration (FEA) hereby announces that fee payments due August 31 for imports made during July may be deferred for up to 15 days pending the resolution of the situation. This action is necessary because resolution is not expected until after August 31.

If the veto is sustained, and the supplemental fee suspended, FEA expects to refund to importers all supplemental fees collected with respect to imports made on or after July 1, 1975.

Issued in Washington, D. C. August 15, 1975.

/s/ Robert E. Montgomery, Jr.
ROBERT E. MONTGOMERY, JR.
General Counsel
Federal Energy
Administration

AFFIDAVIT OF ERIC R. ZAUSNER

I, Eric R. Zausner, having been duly sworn, hereby depose and state:

1. I am a Deputy Administrator of the Federal Energy Administration ("FEA"), having been duly appointed to that post by the President. In this position and in my previous position as Assistant Administrator for Policy and Analysis, I have played a major role in developing and analyzing the President's comprehensive energy program, announced in his State of the Union Address of January 15, 1975, and modifications thereto, including the revised Mandatory Oil Import Program at issue in the present litigation. During the course of this litigation, I have submitted two affidavits, one in the District Court to explain the underlying rationale and operation of the program and the other in this Court in support of appellees' motion for a stay of this Court's mandate. The present affidavit is being submitted in further support of this motion and in response to the allegations of irreparable harm set forth in the memorandum of appellants in opposition to the appellees' motion for a stay of the mandate.

2. The President announced on August 15, 1975, that if Congress sustains his veto of the Emergency Petroleum Allocation Act of 1973, he will suspend indefinitely the supplemental fee on imported crude oil and products, and that he will suspend collection of all supplemental fees (i.e., the current $2.00 per barrel fee) on imports since July 1, 1975. This announcement renders minimal the irreparable harm to the plaintiffs occurring during the interim period between the decision of this Court and the decision of the U.S. Supreme Court, assuming Supreme Court affirmance. The purpose of this affidavit is to explain why such harm would be minimal assuming either that the veto is sustained, and the supplemental fee, therefor suspended, or, in the alternative, that the veto is overridden, and both price controls and supplemental fees remain in effect.

ASSUMPTION THAT SUPPLEMENTAL FEES WILL BE SUSPENDED

3. In my affidavit of August 15, 1975, filed in support of the government's stay motion, I explained that the President had directed the FEA to defer supplemental fee payments (effective July 1, 1975) due on August 31, 1975, until September 15, 1975, pending the resolution of the current debate between the President and the Congress over the extension of FEA's pricing and allocation authority. In the event controls are not continued because of the upholding of the intended Presidential veto of the extension of price control legislation, then no supplemental fees will become due and payable during the period of the requested stay. Therefore, no supplemental fees would have become payable subsequent to this Court's August 11, 1975, decision.

4. The President also announced that, even if his veto is sustained, he would continue in effect the first-tier fees of 21 cents and 63 cents per barrel on crude oil and products, respectively, since these fees serve a purpose different from that of the supplemental fee, which purpose will not be achieved by decontrol. Continued imposition of the first-tier fees pending appeal, however, will not require any substantial payments to be made. All importers that were importing petroleum prior to May 1, 1973, may obtain fee-exempt licenses under provisions of FEA regulations which currently exempt from the base fee 80% of the levels of imports established for the calendar year 1973 with respect to various product categories. See Proclamation 3279, as amended, at § 8; 10 C.F.R. §§ 213.9, 213.12, 213.13, 213.15, 213.16, 213.20, 213.21, 213.28, 213.32, 213.34, 213.36, 213.37 and 213.38. Under these regulations, approximately 90 percent of crude oil imports, 100 percent of residual fuel imports and 50 percent of distillate and motor gasoline imports are exempt from the fee. In addition, normal duty payments on petroleum imports may be used to offset the first-tier fees on crude oil and imported products, thus further reducing any burden of the fees. See Proclamation No. 3279, as amended, Section 3(a)(1)(iv).

It is estimated that the total payment of first-tier fees, if all fee-free license exemptions and duty offsets are taken into account, would not exceed $200,000 per day, as compared to a total cost of approximately $60,000,000 per day for all imported crude oil and products. This is less on the average than four cents per barrel imported (or one-tenth cent per gallon).

ASSUMPTION THAT SUPPLEMENTAL FEES ARE NOT SUSPENDED AND CONTROLS ARE IN EFFECT

5. If, on the other hand, the President's veto were overridden and all import fees therefore remain in place, the harm resulting to appellants if the case is ultimately decided in their favor would not be irreparable. This is because all import fees are required to be placed in a suspense account until the end of the fiscal year and refunds may be effected from this account if it is finally determined that such relief is appropriate. See Proclamation 3279, as amended, Section 3(c)(1). Such appropriate relief might, of course, entail a further refund to the ultimate consumer if the higher costs from the license fees had originally been passed through the distributional system.

6. The Administrator of FEA has been delegated the authority to make refunds from the suspense account for any fees improperly charged. See Proclamation 3279, as amended, Section 3(a)(3)(vii). Although it might be administratively burdensome to achieve a refund of import fees in such a way that all ultimate end-users, such as motor gasoline consumers, are compensated precisely for the effect of the fee, the FEA has had considerable experience in administering refunds and rollbacks as remedies in pricing violation cases and is able to do so in a way that results in substantial compensation to the ultimate victims of overcharges. With respect to identifiable end-users such as appellants, direct refunds in the precise amounts of the fees could be ordered. With respect to unidentifiable retail pur-

chasers, i.e., consumers of motor gasoline or diesel fuel at service stations, price rollbacks at the gas pumps could be required. Thus, mechanisms are available to achieve a return of substantially all import fee payments made since the commencement of the current fiscal year (July 1, 1975), if such payments are ultimately held invalid.

/s/ Eric R. Zausner
ERIC R. ZAUSNER

Subscribed and sworn to before me this 19th day of August, 1975.

/s/ Thomas A. Kemp
Notary Public

My Commission Expires September 14, 1979.

[Caption Omitted]

[Filed August 28, 1975]

MOTION TO MODIFY STAY ORDER IN AID OF COURT'S JURISDICTION

Petitioners-Appellants, nine States, eight Governors, one member of Congress, and ten utility companies, which were Plaintiffs below (hereinafter referred to as "Plaintiffs"), respectfully request this Court to modify the stay which was entered on or about August 21, 1975, and in support thereof aver the following:

1. By their Complaints, Plaintiffs requested a declaration that the fees imposed on imported oil by Executive Proclamation No. 3279, as amended, are illegal, an injunction to prevent further imposition and collection of the fees, and certain additional relief.

2. The United States District Court denied Plaintiffs' request for preliminary and final relief and entered judgment for Defendants, Secretary of the Treasury, Administrator of the Federal Energy Administration, and Treasurer of the United States, on March 11, 1975.

3. Plaintiffs appealed the District Court's decision (Nos. 75-1281 and 75-1282) and also sought a review of the Federal Energy Administration (herein "FEA") regulations implementing Executive Proclamation No. 3279, as amended by President Ford (Nos. 75-1202 and 75-1206).

4. On August 11, 1975, this Court reversed and ordered remanded, for entry of appropriate relief, the District Court judgments and set aside the challenged regulations.

5. Plaintiffs filed motions to shorten the time for issuance of this Court's mandate on August 11, 1975.

6. On August 15, 1975, President Ford announced his present intention indefinitely to suspend, effective July 1, 1975, the supplemental fees on petroleum imports which he had imposed by Executive Proclamation

No. 4341, amending Executive Proclamation No. 3279 (January 23, 1975). Attached hereto as Exhibit A is a copy of an FEA Notice (published at 40 Fed. Reg. 36302) which recites President Ford's announcement.

7. President Ford did not announce an intention to terminate the illegal fee program. To the present time, President Ford has taken no action to suspend the so-called first tier fees on petroleum imports imposed by former President Nixon by Executive Proclamation No. 4210, amending Executive Proclamation No. 3279 (May 1, 1973).

8. On August 15, 1975, the FEA announced that the payment of fees for imports during July, which otherwise would be due on August 31, 1975, could be deferred until September 15, 1975. 40 Fed. Reg. 36302 (August 20, 1975).

9. Plaintiffs are informed that the FEA has transferred to the U.S. Treasury all funds in its possession and under its control as of June 30, 1975. Collection of license fees continued after that date and such additional fees are now held in a fund by the FEA.

10. This Court granted the motion of Appellees (Defendants below) and Respondent FEA on August 21, 1975, staying the Court's mandate of August 11, 1975, until September 15, 1975.

11. Petroleum importers presently are not required to pay the license fees which would have been due on August 31, 1975, until September 15, 1975. However, the anticipated cost of such fees continues to be passed along to Plaintiffs and to other purchasers and end-users of petroleum and petroleum products—in the same fashion as the cost of these illegal fees have been passed on to purchasers and end-users since the license fee program was first initiated. These license fees are clearly includable in the price of petroleum under FEA price regulations, even though such license fees may not have been paid or may not yet be due to the FEA.[1]

[1] Foreign sales of petroleum products are not covered by the price control regulations. 10 C.F.R. Part 212 Section 212.53(b), provides for an exemption of the prices charged for imports, "but only the first sales into U.S. Commerce are exempt". Hence, oil importers who paid the tax are unfettered as to price. At all subsequent sales of petroleum products the allowable price would include the license fee even though not yet paid over to the FEA. Section 212.82 permits refiners to charge the "Base Price", which is defined in Section 212.82(b)(1) to include "landed costs" which explicitly includes all "import fees and duties incurred". Also, according to the definitional Section 212.83(b): "Import fees and duties are 'incurred' (for purposes of determining increased product costs) at the time the product is released from U.S. Customs custody, or entered into U.S. Customs territory, or withdrawn from a bonded warehouse for consumption, whichever occurs first, even though payment of the fees or duties may be at a later date."

Similarly, ceiling prices for specific products, such as gasoline, No. 2 oil and general refined products necessarily include these fees as part of the included "landed costs" of the products. Section 212.83.

12. Oil importers, therefore, need not currently pay these fees to the FEA, although Plaintiffs and other purchasers and end-users of petroleum and petroleum products are paying the cost of such fees to the importers and continue to be irreparably injured thereby. Purchasers and end-users of petroleum and petroleum products will continue to be irreparably injured until the Court's mandate of August 11, 1975, is issued and relief is granted by cessation of not only collection, but also accrual, and hence pass-through of such fees by return of the cost of such fees to those who absorbed it.

13. At the present rate of collection, $9 million per day, Plaintiffs and other purchasers and end-users of petroleum and petroleum products will pay $315 million in illegally imposed license fees between the date of this Court's decision on August 11, 1975, and September 15, 1975.

14. If this Court's decision is upheld by the Supreme Court, the cost of the illegal license fee program must be returned to those who absorbed it.

15. An unforeseen consequence of this Court's stay order of Augsut 21, 1975, and the FEA's temporary suspension of collection of the import fees otherwise due August 31, 1975 is that oil importers are retaining these fees for their own use and are continuing to collect the

cost of such fees from Plaintiffs and other purchasers and end-users of petroleum and petroleum products.

16. In addition to the suspension of collection of the accruing license fees, the FEA intends to refund all supplemental license fees held by the FEA, as announced in the Notice of Deferral of Supplemental Fee Payments, 40 Fed. Reg. 36302 (August 20, 1975):

> "If the veto is sustained, and the supplemental fee suspended, FEA expects to refund to importers all supplemental fees collected with respect to imports made on or after July 1, 1975."

17. Counsel for Plaintiffs have been advised by Deputy General Counsel for Respondent FEA that the FEA intends immediately to implement refunds of collected fees and forgiveness of uncollected fees, if Congress fails to over-ride the Presidential veto of a bill extending price controls over petroleum and petroleum products. Congress is expected to act on or about September 8, 1975, if not earlier. Affidavit of Harold B. Dondis (August 28, 1975).

18. Unless this Court modifies its stay order of August 21, 1975, the FEA's action to "forgive" and "refund" the supplemental license fees will place this fund of illegally imposed license fees (herein the "Fund") beyond the effective control of this Court and the court below. Plaintiffs submit that this Fund is subject to the jurisdiction of this Court and the FEA may not take actions which would frustrate the Court's jurisdiction and irreparably alter the "status quo" in this action.

19. If the Fund were to be dissipated by the actions of the FEA, it would be practically impossible for appropriate relief to be granted by the district court on remand, as required by this Court's decision of August 11, 1975. Multiple legal actions against foreign and domestic oil importers may be required, each involving problems of jurisdiction, venue, differing evidentiary hearings, and different federal and state laws. Possible insolvency of suppliers or distributors in the distribution chain may frustrate legal remedies and cause delay and confusion in the courts. Moreover, it is likely that many

end-users who actually bore the burden of the illegally imposed license fees may lack any representation at all in the legal foray which would follow the FEA's action.

20. If the Fund remains intact, its eventual disposition can be adequately supervised by the Courts or by Congress. The appropriate relief in this action should be for the court to decide, rather than the FEA.

21. The inherent equitable power of the Federal Appellate Court to modify its orders and mandate in order to protect the integrity of its processes and to grant relief from its orders and judgments has been recently settled by decision in this Circuit. *Greater Boston Television Corporation* v. *F.C.C.* (per Leventhal, J.), 149 U.S. App. D.C. 322, 463 F. 2d 268 (1971), *cert. den.* 406 U.S. 950 (1971). *Cf.*, *Perkins* v. *Standard Oil Company of California*, 487 F.2d 672 (9th Cir. 1973). *See also*, 28 U.S.C.A. § 2106.

22. Aside from the Court's authority to modify its own orders, all federal courts are independently empowered to issue appropriate orders, writs and injunctions in aid of their respective jurisdictions under the "All Writs Act", 28 U.S.C. § 1651(a). This power of the federal courts is very broad and has permitted the issuance of restraining orders and injunctive relief by a Circuit Court to protect its *potential* jurisdiction to review actions by federal agencies, even before the agency issued a final order. Federal Trade Commission v. Dean Foods Co., 384 U.S. 597 (1966).

WHEREFORE, Plaintiffs respectfully request this Court to modify the stay entered on August 21, 1975, by ordering and directing that:

(a) On or before September 15, 1975, Defendants shall prepare an accounting of all fees accrued, payable and collected on imports of oil and petroleum products, pursuant to Executive Proclamation No. 3279, as amended, since May 1, 1973, to and including the day immediately preceding the date of such accounting. Such accounting shall be filed with the Court and shall be served simultaneously on counsel for each party to this action.

(b) Defendants shall not forgive, refund, suspend, or defer beyond September 15, 1975, collection of any past accrued fees, except such fees as normally would be subject to refund under present rules of the FEA, without further order of this Court or the Court below after remand.

(c) Defendants shall segregate all such fees which have heretofore been collected and which fees presently are in their possession or under their control.

(d) Defendants shall retain such fees in a segregated account and shall not transfer, expend or dissipate such fees, except such fees as normally would be subject to refund under present rules of the FEA, nor permit their reversion to the United States Treasury, (whether the General Fund, Miscellaneous Receipts, or otherwise) without further order of this Court of the Court below.

(e) Defendants shall record such fees as an obligation of the United States, pursuant to the Budget and Accounting Act, 31 U.S.C. § 200(a)(6).

(f) Defendants are hereby enjoined from deferring collection of past accrued fees beyond September 15, 1975, in order to preserve the segregated fund for such disposition as may eventually be ordered by this Court or the Court below.

Dated: August 28, 1975

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Title 10—Energy

CHAPTER II—FEDERAL ENERGY ADMINISTRATION

PART 213—OIL IMPORT REGULATIONS

Deferral of Supplemental Fee Payments

On August 15, 1975, the President announced that he would indefinitely suspend supplemental fees on petroleum imports (Imposed pursuant to Proclamation No. 4341, amending Proclamation No. 3279, as amended, 40 FR 3965, January 27, 1975) effective July 1, 1975, if Congress sustains his veto of the bill extending the Emergency Petroleum Allocation Act. In light of this announcement, the Federal Energy Administration (FEA) hereby announces that fee payments due August 31 for imports made during July may be deferred for up to 15 days pending the resolution of the situation. This action is necessary because resolution is not expected until after August 31.

If the veto is substantial and the supplemental fee suspended, FEA expects to refund to importers all supplemental fees collected with respect to imports made on or after July 1, 1975.

Issued in Washington, D.C. August 15, 1975.

[Caption Omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY STAY ORDER

COMMOWEALTH OF MASSACHUSETTS)
) ss.
COUNTY OF SUFFOLK)

HAROLD B. DONDIS, being duly sworn, deposes and says:

1. I am a member of the firm of Rich, May & Bilodeau, co-counsel for certain of plaintiff-appellants, consisting of approximately ten utility companies and an individual, Robert F. Drinan, S.J. I am familiar with the prior proceedings herein.

2. This affidavit is submitted in support of the consolidated motion by plaintiff-appellants for a modification of this Court's order of August 22, 1975, which stayed the Court's Mandate of August 11, 1975 until September 15, 1975.

3. On August 26, 1975, I had a telephone conversation with Mr. Douglas G. Robinson who is Deputy General Counsel of the General Counsel's Office under the Federal Energy Administration ("FEA"), with respect to the Notice of Deferral of Supplemental Fee Payments, issued on August 15, 1975. 10 C.F.R. Part 213, 40 F.R. 36032.

4. Mr. Robinson advised that the Federal Energy Administration expected to immediately begin legal steps to provide for the retroactive forgiveness of the supplemental fees due to the FEA and the refund of the fees held by the FEA, if Congress fails to override President Ford's veto of a bill extending price controls over petroleum and petroleum products.

5. As indicated in the motion to this Court, the dissipation of this Fund would effectively prevent this Court or the court below on remand, from issuing any effective remedial orders in this action, would be a windfall profit to the oil importers and would be an abdication by the

FEA of its obligations to the end users of petroleum and petroleum products.

WHEREFORE, I respectfully pray that the relief sought in plaintiff-appellants' motion to this Court be granted.

/s/ Harold B. Dondis
HAROLD B. DONDIS

Sworn to before me this 28th day of August, 1975.

/s/ Paul I. Driscoll
Notary Public

My Commission expires September 26, 1980.

[Caption Omitted]

[Filed September 12, 1975]

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO MODIFY STAY ORDER IN AID OF COURT'S JURISDICTION

Appellees and respondents, by their undersigned attorneys, respectfully oppose the Motion To Modify Stay Order In Aid Of Court's Jurisdiction filed by appellants on the following grounds:

1. *The Court lacks jurisdiction to grant the relief sought.* This Court's judgment was entered on August 11, 1975, and upon the Government's subsequent application, the Court issued a stay of its mandate pursuant to Rule 41(b) of the Federal Rules Appellate Procedure (FRAP). The Court stayed its mandate until September 15, 1975.

On September 10, 1975, the Government filed a petition for a writ of certiorari in the Supreme Court, and the Clerk of this Court was notified of that filing on September 11, 1975.

The motion filed by appellants requests certain complex and affirmative relief against the Government in connection with the administration of the license fee program. In the Government's view, however, this Court no longer has jurisdiction to entertain the relief sought by this motion.

The filing of a petition for a writ of certiorari with the Supreme Court moved this case from the jurisdiction of this Court to the jursidiction of the Supreme Court. The stay entered by this Court pursuant to Rule 41(b), FRAP, is continued by operation of law until Supreme Court disposition in accordance with the provisions of Rule 41(b). In our view, this Court has, therefore, been divested of jurisdiction to grant the relief sought, and appellants' motion should properly be directed to the Supreme Court where the case is presently pending.

2. *In the event this Court considers that it has jurisdiction to entertain the motion, it should be denied.* In its motion seeking a stay of the mandate, the Government indicated the various possible forms of regulation that might be put into effect depending upon the actions of the President and the Congress regarding the current energy problem. The Government also suggested the various forms of relief that might be available in the event the license fee program is eventually held invalid. The Court issued a stay of its mandate.

The instant motion filed by appellants is designed to obtain affirmative relief against the Government in a highly complex and confusing manner concerning the present and future state of regulation. In our view, such relief is not necessary and would only add confusion to the existing complexities in the energy program. The Government's papers supporting the stay of the mandate made clear the Government's interest in taking responsible action with respect to the many variables presented.

For example, the President announced on August 15, 1975, deferral of payment of license fees due and owing on August 31, 1975, until September 15, 1975. In furtherance of this policy of preserving the *status quo*, the FEA on September 11, 1975, sent a notice (attached hereto) to be published in the Federal Register that it will again defer through September 30, 1975, the payment of all license fees which would have been due and owing on August 31, 1975.

The scheme which the appellants now seek to have this Court impose is not only complicated in and of itself but is also based upon the assumption that price controls will not remain on oil. Since this result is clearly uncertain, the motion should be denied.

Respectfully submitted,

/s/ Rex E. Lee
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Assistant Attorney General

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant Attorney General

/s/ Barrie L. Goldstein
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FEDERAL ENERGY ADMINISTRATION

10 C.F.R. Part 213

Notice of Further Deferral of Supplemental Fee Payments Originally Due August 31, 1975

On August 15, 1975, the President announced that he would indefinitely suspend supplemental fees on petroleum imports, effective July 1, 1975, if the Emergency Petroleum Allocation Act was not extended beyond August 31, 1975. In light of this announcement, the Federal Energy Administration announced on August 15, 1975 that supplemental fee payments due August 31 for imports made during July were to be deferred for up to fifteen (15) days pending congressional action on an extension of the Act. 40 F.R. 35302 (August 20, 1975).

On September 10, 1975, the Senate sustained the President's veto of S. 1849, which would have extended the Emergency Petroleum Allocation Act for six months. However, because the Congress is now actively considering a short-term extension of the Act to allow time to reach agreement with the President on a gradual decontrol plan, it is still possible that the Act may be extended beyond August 31, 1975.

Since an extension is possible, the President has not yet determined whether to suspend the supplemental fees incurred with respect to imports made on or after July 1. Accordingly, pending resolution of this situation, FEA hereby announces that payment of supplemental fees incurred on imports in the month of July and originally due August 31 may be further deferred until September 30, 1975.

Issued in Washington, D.C., September 11, 1975.

/s/ Robert E. Montgomery, Jr.
ROBERT E. MONTGOMERY, JR.
General Counsel
Federal Energy Administration

[Caption Omitted]

[Filed September 29, 1975]

Motion to Amend Motion to Modify Stay in aid of Court's Jurisdiction

By order issued this morning, September 29, 1975, this court denied the Motion to Modify Stay in Aid of Court's Jurisdiction filed by Algonquin SNG, Inc. et al. (hereinafter the "utility companies") and Massachusetts, et al. (hereinafter the "states"). The utility companies and the states have filed today along with this motion to amend, a Motion to reconsider the denial of The Motion to Modify Stay in aid of Court's Jurisdiction.

In light of the imminent threat to this court's jurisdiction posed by *Amoco Oil Company* v. *Zarb*, civil action No. 75-1579, as well as other threatened and pending litigation the utility companies and the states hereby move to amend their Motion for Stay in Aid of Court's Jurisdiction to request the following relief, in lieu of that sought previously in that motion:

The utility companies and the states move this Court to order and direct:

(a) Defendants shall not forgive, refund or defer collection of any past accrued fees, except such fees as normally would be subject to refund under present rules of the FEA, without further order of this Court or the Court below after remand.

(b) Defendants shall segregate all such fees which have heretofore been collected and which fees presently are in their possession or under their control.

(c) Defendants shall retain such fees in a segregated account and shall not transfer, expend or dissipate such fees, except such fees as normally would be subject to refund under present rules of the FEA, nor permit their reversion to the United States Treasury, (whether the General Fund, Miscellaneous Receipts, or otherwise) without further order of this Court of the Court below.

(d) No persons shall interfere with the collection of any license fees pursuant to existing FEA regulations without further order of this court or the court below on remand.

(e) Any and all proceedings interfering with said fund or collections thereof are hereby prohibited and enjoined.

Under common law principles which recognize that where the agent of litigation requires the control and dominion of the property involved in the litigation that court which first acquires possession or dominion over the property has the exclusive jurisdiction over the right to dispose of it. See *Young* v. *Hamilton*, 135 Ga. 339, 69 S.E. 593 (1910); *State* v. *Fredlock*, 52 W.Va. 232, 43 S.E. 153 (1903). Although this action is nominally an *in personam* action, the activity of the District Court, on remand, to fashion appropriate equitable relief is dependent upon the existence of a fund consisting of all accrued license fees which have been passed through and borne by the "utility companies", the "states", and the public consumer.

Appellants hereby request oral argument to clarify the complex issues presented by threatened multiplicity of suits and repeated changes in the license fee program.

Respectfully submitted,

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[Caption Omitted]

[Filed October 6, 1975]

APPELLEES' OPPOSITION TO APPELLANTS' MOTIONS TO AMEND MOTION TO MODIFY STAY IN AID OF COURT'S JURISDICTION AND TO RECONSIDER APPELLANTS' MOTION TO MODIFY STAY IN AID OF COURT'S JURISDICTION

Appellees and respondents, by their undersigned attorneys, respectfully oppose Appellants' Motion To Amend Motion To Modify Stay In Aid Of Court's Jurisdiction. The grounds for this opposition are:

1. This Court, on September 29, 1975, denied the Appellants' Motion To Modify.

2. The appellants now seek to have this Court reconsider that denial in light of the filing of certain actions in the United States District Court for the District of Columbia and in the United States District Court for the Southern District of Texas. Those suits seek to enjoin the Federal Energy Administration ("FEA") from its continued collection of supplemental license fees largely on the basis of this Court's August 11, 1975, decision.

3. On September 30, 1975, and October 2, 1975, the District Court for the District of Columbia (Flannery, J.) and the District Court for the Southern District of Texas, Houston Division, respectively, entered Temporary Restraining Orders. Copies of those Orders are attached hereto as Exhibits A and B.

4. The terms of those Orders should, as of this time, eliminate the concerns expressed by the appellants. First, both district courts have framed their Orders so that the supplemental license fee program may remain in operation. As the appellants previously have sought, the FEA will continue collection of supplemental license fees, including those fees due and payable on August 31, 1975. Second, both district courts have ordered that the fees collected by the FEA should be paid into a special account in the United States Treasury which shall be

available for repayment pending further adjudication of the many, as yet unresolved issues in these new suits. The Government submits that those Orders as of this time adequately preserve the *status quo*.

For all of the above reasons, appellants' Motions should be denied.

Respectfully submitted,

/s/ Rex E. Lee
REX E. LEE
Assistant Attorney General

/s/ Irwin Goldbloom
IRWIN GOLDBLOOM
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/s/ Barrie L. Goldstein
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1579

AMOCO OIL COMPANY, PLAINTIFF

v.

FRANK G. ZARB, ET AL., DEFENDANTS

Civil Action No. 75-1581

STANDARD OIL COMPANY OF CALIFORNIA, ET AL., PLAINTIFFS

v.

WILLIAM E. SIMON, ET AL., DEFENDANTS

Civil Action No. 75-1591

EXXON CORPORATION, ET AL., PLAINTIFFS

v.

WILLIAM E. SIMON, ET AL., DEFENDANTS

Civil Action No. 75-1594

MOBIL OIL CORPORATION, PLAINTIFF

v.

FRANK G. ZARB, ET AL., DEFENDANTS

Civil Action No. 75-1595

TEXACO, INC., PLAINTIFF

v.

WILLIAM E. SIMON, ET AL., DEFENDANTS

TEMPORARY RESTRAINING ORDER

[Filed 9-30-75, James F. Davey, Clerk]

These matters come before the court on application of plaintiffs in the above-entitled actions for a temporary

restraining order. Upon consideration of the pleadings and memoranda submitted by the plaintiffs therewith, the defendants' opposition thereto, and the arguments of counsel thereon, it appears to the court that plaintiffs will suffer immediate irreparable harm if the payments required to be paid on September 30, 1975 are paid unconditionally, the defendants will suffer almost no harm from the conditional payment of the funds in question, the public has a great interest in the orderly adjudication of this matter, and, in light of the small harm defendants may suffer from the issuance of this order, plaintiffs have made an adequate showing of their likelihood of success on the merits. Therefore, it is by the court this 30th day of September, 1975,

ORDERED

(1) That plaintiffs pay the oil import license fees on crude oil and petroleum products imported during the months of July and August 1975 to the Federal Energy Administration to be paid into the United States Treasury, upon the condition that these monies be held in a special account and shall be repayable in full to plaintiffs pending this court's adjudication of plaintiffs' applications for preliminary injunctive relief. Payment on October 1, 1975 shall be deemed payment on September 30, 1975 for the purposes of complying with applicable regulations.

(2) That such funds and funds paid by other similarly situated parties shall be held by the United States Treasury in such manner as to be available for repayment to plaintiffs and other similarly situated parties pending this court's adjudication of plaintiffs' applications for preliminary injunctive relief; and it is further

ORDERED that this restraining order shall remain effective until October 9, 1975 and the parties shall appear before this court on October 9, 1975 at 11:00 a.m. for a hearing on their applications for preliminary injunctive relief.

This temporary restraint is contingent upon the plaintiffs maintaining in effect the bonds previously posted with defendants to secure payment of the oil import license fees.

/s/ Thomas A. Flannery
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed Oct. 1, 1975]

Civil Action No. 75-H-1668

COASTAL STATES GAS CORPORATION, PLAINTIFF

v.

FEDERAL ENERGY ADMINISTRATION, ET AL, DEFENDANTS

CONSOLIDATED WITH

Civil Action No. 75-H-1669

APCO OIL CORPORATION, PLAINTIFF

v.

FEDERAL ENERGY ADMINISTRATION, ET AL, DEFENDANTS

CONSOLIDATED WITH

Civil Action No. 75-H-1670

CHARTER INTERNATIONAL OIL COMPANY AND
KERN COUNTY REFINERY, INC., PLAINTIFFS

v.

FEDERAL ENERGY ADMINISTRATION, ET AL, DEFENDANTS

CONSOLIDATED WITH

Civil Action No. 75-H-1671

ASHLAND OIL, INC., PLAINTIFF

v.

FEDERAL ENERGY ADMINISTRATION, ET AL, DEFENDANTS
MURPHY OIL CORPORATION, INTERVENOR

ORDER

The motion of Murphy Oil Corporation ("Intervenor") to intervene in Civil Action No. 75-H-1671, being unopposed, is granted. All references hereafter made to "plaintiffs" should be read to include the Intervenor. Plaintiffs' motions for Temporary Restraining Order and Preliminary Injunction are granted in part and denied in part.

I. INTRODUCTION

In these four consolidated cases plaintiffs seek equitable relief, pursuant to Fed. R. Civ. P. 65, to restrain defendants, the Federal Energy Administration (FEA) and Frank G. Zarb, Administrator of the FEA, from collecting fees pursuant to the Import Fee Program authorized by Presidential Proclamation 4210, effective May 1, 1973, which was created pursuant to authority impliedly delegated to the President by the Congress in the Trade Expansion Act of 1962, 19 U.S.C. § 1862(b) (1970).

II. THE IMPORT FEE PROGRAM

Pursuant to Proclamation and statute, the FEA imposes fees upon the importation of certain crude petroleum and certain finished crude petroleum products. Plaintiffs are importers within the coverage of the program and are liable for fees based on the number of barrels of petroleum and petroleum products they import into the United States each month. Payment for monthly imports is required to be made within one month after the products are imported. 10 C.F.R. § 212.34(d)(3)(i). Additionally, pursuant to federal regulations, plaintiffs are required to be licensed and to furnish to defendants a certified check or a bond in the amount of fees to be paid for future imports. Plaintiffs in this case are licensed and have tendered surety bonds in amounts which satisfy the regulations. The program is designated to place a "burden on imported products"; that is, the ultimate cost of the fees is intended to be borne by those who finally use the products. Therefore,

the importers who are directly responsible for paying the fees to the United States Treasury are permitted to "recover" the fees by adding to costs to 'downstream' consumers.

III. LEGALITY OF THE PROGRAM THE ALGONQUIN CASE AND THE PETITION FOR CERTIORARI

Plaintiffs refuse to pay the fees allegedly owing for importation of products during July and August, 1975. This refusal is premised on a decision by the United States Court of Appeals for the District of Columbia Circuit in *Algonquin SNG, Inc.* v. *FEA*, 518 F.2d 1051 (D.C.Cir. 1975). In the *Algonquin* case, a panel of the Court of Appeals, with one judge dissenting, held that the Presidential Proclamation which authorized the imposition of fees on imported petroleum and petroleum products exceeded the authority granted to the President pursuant to 19 U.S.C. § 1862(b). The program was, in effect, declared to be invalid.

However, before issuing its mandate and remanding the case to the United States District Court for the District of Columbia, the Court of Appeals granted a stay of the mandate through September 15, 1975. Subsequently, on September 11, 1975, the Justice Department, on behalf of the FEA, filed a petition for writ of certiorari in the United States Supreme Court. Pursuant to Rule 41, Fed. R. App. P., this filing had the effect of continuing the stay of the Court of Appeals' mandate. No decision has yet been made by the Supreme Court as to whether the petition should be granted. Defendants contend that the Import Fee Program continues to be enforceable because of the stay of the mandate by the Court of Appeals, and that plaintiffs should pay the fees owing for July and August promptly by the deadline on September 30, 1975.

The Import Fee Program represents an important effort by the President to cope with the energy problems confronting this nation. 518 F.2d at 1062. This Court can only conclude that by issuing its stay, the

Court of Appeals did not wish to impede the administration of the program during the pendency of any appeal to the Supreme Court. The FEA has so interperted the granting of the stay and, based on Congressional and Executive actions taken since August 11, 1975, to sustain some form of oil price regulation, has announced its intention to continue to collect fees owing for July and August, 1975, and thereafter. *See* 40 Fed. Reg. 42570 (September 15, 1975); 40 Fed. Reg. 43950 (September 24, 1975); 40 Fed. Reg. 44306 (February 26, 1975).

Whether through a denial of the petition for certiorari or a thorough review on the merits of the decision by the Court of Appeals, the Supreme Court will decide ultimately whether defendants have the authority to collect the fees described in the Proclamation.

IV. CONTROVERSY OVER MANNER OF PAYMENT AND REFUND

A controversy has arisen with regard to whether fees collected in the face of the *Algonquin* holding by the Court of Appeals will be refunded. The FEA issued a notice on September 26, 1975, as yet not published in the Federal Register, which discusses the *Algonquin* ruling and purports to categorize fees paid under the Import Fee Program subsequent to the date of the *Algonquin* holding (August 11, 1975) as being "paid under protest". The notice goes on to state that if the courts order fees so paid to be refunded, the FEA would do everything within its authority to assure that the benefits of the refunds are received by those persons incurring the cost of the fees being refunded.

Plaintiffs contend, however, that this notice does not sufficiently protect the interests of those paying the fees at this time, in light of the *Algonquin* ruling. According to plaintiffs, the notice as properly interpreted represents a statement by the FEA to the effect that even if the *Algonquin* decision is affirmed by the Supreme Court, the collection of refunds may be in doubt because the FEA intends to assert other applicable defenses to thwart refunding of money. To plaintiffs, the position of the FEA, as stated in the notice of September 26, 1975, points solely to the conclusion that plaintiffs' depositing the money allegedly owed into the U.S. Treasury in any account will result in plaintiffs' loss of the money, regardless of the ultimate determination of the legality of the fee program by the Supreme Court. Thus, while plaintiffs do not really protest paying the fees allegedly owing, they do protest having to face subsequent litigation to recover fees allegedly collected under an illegal program. They further contend that they should not have to proffer the fees twice, since they have all tendered bonds to the FEA representing the amount of fees owing, and that they should not have to forfeit any interest which may accrue while the funds are being held during the pendency of the *Algonquin* appeal before the Supreme Court.

They therefore propose to deposit the fees in an escrow account or in the registry of the Court in the form of interest-bearing certificates or other like securities to maintain the status quo. In this manner, according to plaintiffs, neither they nor the Government will be deprived of interest earned on the money held, and the plaintiffs further wish to avoid double payment of the fees by requesting a release of bonding capacity they have paid for to cover the fees owing for July and August so that the "freed-up" bonds can be used for licensing to permit future importation.

V. ORDER OF JUDGE FLANNERY

Concurrently with this litigation, an identical litigation of five consolidated cases has been going forward in the United States Court for the District of Columbia. *See Amoco Oil Company* v. *Zarb, et al*, —— F.Supp. ——, Civil Action No. 75-1579 (September 26, 1975). The Honorable Thomas Flannery, United States District Judge for the District of Columbia, presided over a hearing on September 29, 1975, in which the plaintiffs, who are five of the major American oil companies and are licensed importers under the Import Fee Program,

protested having to pay fees allegedly owing for July and August, 1975. In essence, Judge Flannery was confronted with a situation identical to that faced by this Court.

On September 30, 1975, Judge Flannery entered an order. Upon evaluating the equities of the case before him, Judge Flannery held that the Washington plaintiffs were entitled to temporary relief to avoid irreparable harm they would otherwise suffer if they had to pay the fees unconditionally. To Judge Flannery, defendants would suffer almost no harm from the conditional payment of the funds in question, and he acknowledged as well the great public interest in the orderly adjudication of a matter of this magnitude. Judge Flannery thus directed the plaintiffs to pay the import fees into a special fund in the Treasury to be held subject to the further orders of that Court. Judge Flannery further granted plaintiffs an extension of one day in which to pay the fees, and his order was made contingent upon "the Plaintiffs maintaining in effect the bonds previously posted with Defendants to secure payment of the oil import license fees." Judge Flannery further stated that his order was to remain in effect until October 9, 1975, at which time he would conduct a hearing on plaintiffs' application for Preliminary Injunctive relief. *See* Order of the Court at 2, *Amoco Oil Co.* v. *Zarb*, —— F. Supp. —, Civil Action No. 75-1579 (September 30, 1975).

VI. FEA NOTICE

As the instant order was being prepared, this Court was notified that the FEA had issued a notice concerning collection of the oil import fees in light of the ruling of Judge Flannery. That notice, which has not been published in the Federal Register as yet, is made a part of this Order as Appendix No. 1.

VII. EVALUATION OF THE INSTANT MOTIONS FOR INJUNCTIVE RELIEF

The factors to be considered in determining whether temporary injunctive relief is appropriate are: (1)

whether the plaintiff is likely to prevail on the merits; (2) whether the plaintiff is in danger of suffering irreparable harm; (3) whether the potential harm to the defendant from issuance of the injunction outweighs the possible harm to the plaintiff if injunctive relief is denied; (4) whether issuance of a preliminary injunction will serve the public interest. *Blackshear Residents Organization* v. *Romney*, 472 F.2d 1197, 1198 (5th Cir. 1973).

Since the *Algonquin* ruling by the District of Columbia Circuit is the only legal precedent, the plaintiffs are likely to prevail on the issue of the legality of the program at this time, pending a determination by the United States Supreme Court. This Court agrees with Judge Flannery that these plaintiffs will suffer irreparable harm by paying the import fees unconditionally and potentially facing substantial expense to litigate to collect a refund. By contrast as they now concede in the September 30 notice, defendants will realize little harm by collecting fees and placing them in separate, clearly marked accounts at the Treasury Department to ease their being refunded if and when that is appropriate. Finally, and most importantly, in a program of this magnitude, which has so vital an impact on the public interest, the Court concludes that the staying of the mandate by the Court of Appeals for the District of Columbia Circuit does entitle defendants to continue to administer the program at this time, and that the administration of the program must be conducted in an orderly, uniform manner.

Therefore, in accordance with the order of Judge Flannery and the stated intent of the FEA, as expressed in the notice issued September 30, 1975, plaintiffs are directed at this time to pay the full amount of the fees owing for July and August, 1975, into the special account at the Treasury Department heretofore established for this special purpose. The Court concludes that the status quo can best be maintained in this manner, especially considering the overriding importance to the public interest in having the Import Fee Program administered in an orderly, uniform manner throughout the country.

Plaintiffs should not have to proffer "double payment," however, and thus the surety bonds they have provided to the FEA for all amounts paid under the Import Fee Program for imports in July and August should be "freed up". Under the circumstances of this case and in view of the efforts expended by the parties beyond the original deadline of September 30, 1975, to resolve the case without judicial review, the Court hereby declares that payment by these plaintiffs and the intervenor on October 2, 1975, shall be deemed payment on September 30, 1975, for the purpose of complying with applicable regulations.

VIII. CONCLUSION

At this time, defendants are entitled to continue to administer the Import Fee Program, as discussed in Judge Flannery's order and the FEA notice of September 30, and plaintiffs should continue to pay all fees owing at the proper times. The continued vitality of the program will depend on any decision rendered by the Supreme Court.

All parties have had the opportunity to present fully their respective positions to this Court, both orally and in writing. Because of the posture of this case and the full consideration this Court has given to all of the issues raised therein, the Court concludes that preliminary injunctive relief should be granted as described above, that the requirements of Fed. R. Civ. P. 65 have been satisfied, and that no hearing or further briefing is required at this time.

There has been a question raised by defendants as to whether plaintiffs would be entitled to a refund if the program is finally invalidated, in view of the design of the program to enable petroleum importers to "pass on" their fee costs to other consumers. Plaintiffs have also raised a question concerning the recovery of interest on fees which may be refunded. The Court acknowledges the presence of such accounting problems at this time, but concludes that no determination need be made of these issues until such time as it may be determined that a refund must be made. If a refund should be

necessary, the Court at that time can order whatever relief is appropriate.

Therefore, the parties are directed, in accordance with this order, to prepare an order capsuling the salient points of this Court's holding and designed to remain in effect until such time as the parties return to this Court once the Supreme Court issues an order finally resolving the appeal of the *Algonquin* case.

DONE at Houston, Texas, this 1st day of October, 1975.

/s/ Carl D. Bue, Jr.
CARL D. BUE, JR.
United States District Judge

FEDERAL ENERGY ADMINISTRATION
OIL IMPORT REGULATIONS

NOTICE CONCERNING COLLECTION OF OIL IMPORT LICENSE FEES DUE SEPTEMBER 30, 1975

On September 30, 1975, the United States District Court for the District of Columbia in the matter of Standard Oil Company of California, et al., vs. William E. Simon, et al (Civil Action No. 75-1581) and related cases, entered a Temporary Restraining Order requiring that oil import license fees due and payable by the plaintiffs on September 30, 1975, for oil imported by them during July and August 1975, be collected in their customary manner and placed in a special account in the United States Treasury, subject to further order of the Court. A copy of the Court's Order is attached. In order to allow sufficient time for this Order to be entered and for sufficient notice of its effect to be circulated to all interested parties, the Federal Energy Administration (FEA) agreed and the Court ordered, that the time for payment of such fees be extended for one day, until October 1, 1975.

In compliance with that order the FEA has today requested the Treasury Department to establish such a separate account and understands that this will be accomplished today. For purposes of administrative convenience and uniformity and consistent with the notice issued by the FEA on September 26, 1975 (40 F.R. —, October 1, 1975), the FEA intends to place into that special account all import license fees due and payable on October 1, 1975 by all importers and not just those fees paid by plaintiffs in the above mentioned litigation. It should be noted that the Court's order does not relieve any importers of the duty to pay import license fees for their July and August imports or for their imports in subsequent months in accordance with FEA's mandatory oil import regulations, 10 C.F.R. part 213. Therefore, the FEA intends to continue to take whatever administrative action is necessary to insure that all

importers of crude oil and refined petroleum products continue to comply with those regulations.

Issued in Washington, D.C., September 30, 1975.

/s/ Robert E. Montgomery, Jr.
General Counsel

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1202 SEPTEMBER TERM, 1974

ALGONQUIN SNG, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

AND CONSOLIDATED CASES

Before: Tamm, Leventhal and Robb, Circuit Judges

ORDER

On consideration of petitioners' motion for shortening from 21 to 10 days time within which the mandate will issue, appellees' and respondents' motion for stay of mandate pursuant to Rule 41(b) of the Federal Rules of Appellate, and of the responses to the foregoing, it is

ORDERED by the Court that the motion for shortening time to issue mandate is denied, and, it is

FURTHER ORDERED by the Court that the motion for stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment to and including September 15, 1975.

Per Curiam

For the Court:
HUGH E. KLINE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1202 SEPTEMBER TERM, 1975

ALGONQUIN SNG, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

AND CONSOLIDATED CASES

Before: Tamm, Leventhal and Robb, Circuit Judges

ORDER

On consideration of the motion of petitioners-appellants to modify stay order in aid of the Court's jurisdiction, and of the responses thereto, it is

ORDERED by the Court that the aforesaid motion of petitioners-appellants is denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 75-382

[Received Nov. 19, 1975, Office of the Solicitor General]

FEDERAL ENERGY ADMINISTRATION, ET AL., PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed November 3, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. In addition to the question presented by the petition, the parties are directed to brief and argue the applicability of the Anti-Injunction Act, 26 U.S.C. 7421.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 598540 145

Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-3821

FEDERAL ENERGY ADMINISTRATION ET AL.,
PETITIONERS,

v.

ALGONQUIN SNG, INC., ET AL.,

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No.

FEDERAL ENERGY ADMINISTRATION ET AL.,
PETITIONERS,

v.

ALGONQUIN SNG, INC., ET AL.,

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This brief is submitted by the Attorney General of Massachusetts on behalf of nine states and the governors of eight of those states, all of whom are respondents in the above-captioned matter. A separate, but similar, brief will be submitted on behalf of ten utilities and Congressman Drinan,

who are also respondents. Except as otherwise noted, the preliminary material contained in the petition for a writ of certiorari is adopted. Throughout this brief, Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. § 1862(b), as amended by Section 127(d) of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1993, is referred to simply as Section 232(b).

Jurisdiction.

Jurisdiction of the lower federal courts was properly invoked. The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1340. Respondents filed in the Court of Appeals an appeal from a final decision of the District Court pursuant to 28 U.S.C. § 1291 and a petition for review of Federal Energy Administration regulations pursuant to 15 U.S.C. § 766(i)(2)(A). Jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

Argument.

I. Certiorari should Not be Granted Because the President and Petitioners have Announced their Intention to Abandon the License Fee Program Declared Unlawful by the Court of Appeals.

There are no "special and important reasons" for granting a writ of certiorari in this case as required by Supreme Court Rule 19, 28 U.S.C.A. This is not to say that the energy crisis does not pose real problems or that the legal questions presented are not scholarly. It is only to say that the traditional criteria embodied in Rule 19 are lacking. In illustrating the character of reasons which may be deemed "special and important," that Rule refers to cases:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioners point to no conflict among the courts of appeals nor between the lower court decision and earlier decisions of this Court. Instead they state the proposition that the scope of the President's authority under Section 232(b) to impose license fees on imported petroleum products is a matter "of fundamental and urgent importance to the economic well-being of the Nation and should be resolved by this Court." (Pet. at 11.) Respondents agree that the federal question presented by the petition is one of substance, but submit that it is inappropriate for resolution by this Court and that it is not of fundamental and urgent importance. In fact, the public pronouncements made by the President and petitioners since the issuance of Presidential Proclamation 4341 suggest that the license fee program, declared unlawful by the Court of Appeals, is not even basic to the President's energy program.

On March 4, 1975, the President issued Proclamation 4355 which delayed the imposition of the supplemental license fees for sixty days. That Proclamation opens with the following rationale:

> "WHEREAS, I judge it necessary and consistent with the national security, taking into account the economic welfare of the Nation, that provision be made to defer scheduled increases in the fees applicable to imported petroleum and petroleum products for two months. . . ." 40 Fed. Reg. 10437 (1975).

On the same day the President vetoed H.R. 1767, a measure which would have suspended for a period of ninety days any authority the President might have under Section 232(b) to adjust imports with a fee mechanism. There are obvious inferences from the executive actions taken on March 4th. The first is that the interests of national security really are not the issue in this case, since those interests did not change between January, when the license fees were seen as imperative, and March, when their deferral was necessary. The second inference is that the President was willing to bargain with Congress on energy policy.

Both of these inferences are supported by the language of Presidential Proclamation 4370, issued on April 30th, which also deferred the imposition of the two and three dollar license fees in the name of "national security." In that Proclamation the President spoke of a need to "maintain flexibility to accommodate evolving programs for discouraging [oil] importation" and the Congressional need to develop "alternative programs." 40 Fed. Reg. 19421 (1975).

Even after the license fees were declared unlawful by the Court of Appeals, the petitioners and President have retained a bargaining posture concerning license fees. On August 15, 1975, the President announced that he would indefinitely suspend supplemental fees on imported petroleum if Congress sustained his veto of S. 1849, a six month extension of controls on oil. On the same day the petitioner Federal Energy Administration announced a program of deferred payments and contemplated suspension and forgiveness of uncollected fees. 40 Fed. Reg. 36303 (1975). The United States Senate did sustain President Ford's veto on September 9, 1975. The FEA has reiterated this basic bargaining position as recently as September 11, 1975, when it announced that a decision finally to suspend the license fees would not be made until Congress had acted on a short-term extension of price controls. 40 Fed. Reg. 42578 (1975).

On September 22, 1975, the Federal Energy Administration announced the removal of the sixty cents per barrel fee on imported refined petroleum products, which had been imposed on June 1, 1975. The sixty cents fee was removed retroactively to September 1, 1975. The FEA simultaneously stated that President Ford will decide by October 1, 1975, whether to remove the remaining two dollars per barrel fee on imported crude oil. 40 Fed. Reg. 43950 (1975).

The proposed program of suspension and forgiveness has a dual significance to this Court. First, it emphasizes the fact that the essence of the President's energy program is higher prices which will in turn lead to conservation. Both decontrol and license fees are merely means to achieve the end, higher prices. The executive and legislative branches of the government are still actively seeking a mutually acceptable energy policy and discretionary intervention in the bargaining process by this Court would be untimely and inappropriate.

Second, and perhaps more important, the fact that collection of the license fees has been suspended renders this case

"academic and episodic"[1] within the meaning of *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). The language of Justice Frankfurter's opinion bears repeating:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Id.* at 74 (citations omitted).

In the case at bar, petitioners seek to invoke the discretionary certiorari jurisdiction of this Court because of the importance of a license fee system they intend to abandon.

[1] In *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940), certiorari was denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." Ordinarily a denial of certiorari is without "stare decisis" effect as to the issue presented in the petition therefor. *City of Indianapolis* v. *Chase Nat'l Bank*, 314 U.S. 63 (1941). This follows from the ordinary practice of the Supreme Court not to explain such a denial. "Of course, when the reasons are given, the decision to deny [a petition for a writ of certiorari] will have the effect indicated by the reasons stated." *Brown* v. *Allen*, 344 U.S. 443, 489 (1953) (Frankfurter, J., speaking for the majority as to this issue). See, *United States* v. *Kras*, 409 U.S. 434, 443 (1973). Respondents submit that the logic implicit in the *Sweeney* denial of certiorari is compelling in the instant case.

Even if all the other contentions raised by their petition are accepted as valid, the fact remains that this case no longer presents the "special and important reasons" necessary for granting the petition for a writ of certiorari.

II. Certiorari should Not be Granted Because the Decision of the Court of Appeals is Consistent with Other Pertinent Federal Decisions and the Legislative History of Section 232(b).

The decision of the Court of Appeals is consistent with earlier decisions of this Court. The dispositive issue in that court was whether or not Section 232(b) conferred on the President the authority to impose massive license fees on imported petroleum products. Petitioners took the position that the operative words of the section gave the executive the broadest type of power — the power to use any device to lower imports of material threatening the national security. Respondent argued that such an expansive reading of Section 232(b) raised constitutional problems and urged the lower court to adopt an interpretation of the statute which avoids serious constitutional problems. The Court of Appeals properly interpreted the section as authorizing direct methods of adjusting imports, such as quotas, but not indirect methods, such as license fees.

It is a primary maxim of statutory construction that when a statute is ambiguous, "construction should go in the direction of constitutional policy." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). This rule was recently restated in forceful terms by this Court in *Blanchette* v. *Connecticut General Insurance Corp.*, 419 U.S. 102, 134 (1974). There the Court adopted the language of the lower court and stated:

> "'[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way.'" *Id.* at 134 (quoting *In Re Penn Central Transp. Co.*, 384 F. Supp. 895, 944 (Special Court 1974)).

In *National Cable Television Association* v. *United States*, 415 U.S. 336 (1974), this Court applied that rule of strict construction in a case which in many respects is analogous to the case at bar. There the Federal Communication Commission had imposed annual fees on CATV systems at a rate of $.30 per subscriber. Those fees were imposed in reliance on the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483(a), and were expected to produce $1,145,400 in annual revenues. *Id.* at 340.

This Court held that the fees were not related to the benefit conferred and that they were so excessive as to go beyond the commonly accepted meaning of a "fee." The opinion noted that the power to lay and collect taxes is a legislative function and that the fees imposed by the FCC were in the nature of a tax. The Court then suggested that a constitutionally valid delegation of the taxing power must be limited by an intelligible principle to which the body authorizing fees is directed to conform. Rather than reach the serious questions of constitutionality, the Court chose an interpretation of the statute which permitted only the imposition of fees related to the benefit conferred.

The instant case also involves the validity of fees which in reality operate as a revenue raising device. Whereas in fiscal 1974 revenues raised from *all* tariffs totalled $4.3 billion, the White House projected annual revenues from license fees on

imported oil alone at $4.8 billion. Once again, a serious question is raised concerning the constitutional validity of such a broad delegation of taxing power.

Respondents contend, in light of *National Cable Television Association*, that the Court of Appeals was compelled to interpret Section 232(b) to prohibit the imposition of such fees. See also, *Federal Power Commission* v. *New England Power Company*, 415 U.S. 345 (1974).

The opinion of the lower court is also consistent with decisions by other federal courts. *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (Cust. Ct. 1974), is one example of a federal decision in conformity with that of the Court of Appeals.

In *Yoshida*, President Nixon asserted that the imposition of a 10 per cent surcharge on most imported articles was authorized by Section 5(b) of the Trading With The Enemy Act (50 U.S.C. App. § 5(b)). That act provided him with sweeping powers during any period of national emergency to issue licenses and to "regulate . . . any . . . importation . . . of . . . any property in which any foreign country or a national thereof has any interest."

The Customs Court held that this broad grant of power did not include a delegation of the taxing power.

> "It cannot be said that the investiture of a power to 'regulate' necessarily includes, *per se*, the power to levy duties." *Id.* at 1171.

We suggest, similarly, that the investiture of the power to "adjust" does not include the power to impose fees exceeding the value of the benefits provided to the importer.

Yoshida is also significant in the sense that it gave extensive consideration to the legislative history of the Trade Agreement Act of 1934 and its amendments through the Trade Expansion Act of 1962. The Customs Court, like the Court of Appeals, found the failure of Congress in 1962 to enact proposed Section 353 to be illuminating:

> "Deletion of the provision [proposed § 353] not only demonstrates that Congress was unwilling to grant such expansive discretionary power to the President, but also indicates a probable recognition by Congress that such an unrestrained grant of authority to increase existing duties and impose nonexisting duties may well have been an invalid delegation of legislative power vested solely in the Congress by the Constitution." *Id.* at 1166.

The Court of Appeals in this case drew two conclusions from the fact that Section 353 failed to be enacted. The first was that Congress believed that no other provision of the Trade Expansion Act of 1962, including Section 232(b), conferred the powers explicitly included in that section. The second was that, in enacting the Trade Expansion Act of 1962 including Section 232(b), Congress intentionally rejected the conferral of a discretionary Presidential tariff power. Respondents submit that these conclusions are logically sound and consistent with previous decisions of this Court. See *Continental Casualty Co.* v. *United States*, 314 U.S. 527 (1942); *United States* v. *Arredondo*, 31 U.S. (6 Peters) 691 (1832).

Of course the lower court's treatment of the legislative history was not limited to an analysis of the 1962 statute. To the contrary, the court had before it and properly weighed the history of trade legislation throughout the twentieth century. It concluded that when Congress desires to delegate a taxing

power it does so explicitly.[2] The court was, therefore, unwilling to find an implicit delegation of taxing power in Section 232(b). This result is required by both the legislative history and case law and is afforded exemplary treatment in the decision of the lower court.

The petition for a writ of certiorari raises for the first time a number of points dealing with the legislative history of Section 232(b). The manifest purposes of this new material is to indicate that the treatment afforded legislative history by the Court of Appeals was inadequate. Even if this material had been properly before that court, it would not have changed the result.

As part of the proposed Trade Act of 1970, the House passed an amendment of Section 232(b) designed to prohibit "any adjustment of imports . . . accomplished by the imposition or increase of duty or of any fee or charge having the effect of a duty." H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 23 (1970). Significantly, the measure was reported out of the Senate Committee on Finance not as part of a comprehensive trade act but as an amendment to the Social Security Act of 1970.

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[2] The petitioners claim the so-called "escape clause," Section 351(a)(1) of the Trade Expansion Act, 19 U.S.C. § 1981(a)(1), confers analogous authority upon the President. The proposition is advanced to show that the broad language of Section 232(b) is not an anomalous departure from previous practice. Such an analysis cannot be sustained upon a careful examination of the statutes. The purpose of the "escape clause" is to protect an industry from detrimental foreign competition. The statute expressly gives the President the authority to impose "any duty or other import restriction" to protect a domestic industry. Section 232(b) was enacted with the stated purpose of protecting the national security and does not expressly or impliedly grant the authority to impose indirect controls on imported items. The fact remains that when Congress has delegated its control over tariffs and duties it has consistently done so in an explicit, well-defined manner, as in the case of the escape clause. Thus, the construction of Section 232(b) advanced by petitioners would, indeed, be inconsistent with the previous history of trade legislation.

It was subsequently deleted on the floor of the Senate by a vote of 49-21 and was not enacted.

The petitioners have suggested that the failure of Congress to enact this amendment in 1970 is relevant to a consideration of the meaning of Section 232(b). The respondents contend that the events of 1970 are irrelevant for three reasons. First, those events do not constitute legislative history of Section 232(b) because they occurred well after the original enactment of the section and its subsequent re-enactment. The views of the Ninety-First Congress on the meaning of Section 232(b) do not provide a solid basis from which the intention of an earlier Congress may be inferred. See, *Haynes* v. *United States*, 390 U.S. 85 (1968); *United States* v. *Price*, 361 U.S. 304 (1960).

Second, the Senate vote to delete the 232(b) amendment came on a motion by Senator Long to recommit the entire Social Security Amendment Act to the Committee on Finance. Senator Long, who was Chairman of that Committee, opened the debate on the motion to recommit with the following statement:

> "[I]f we are to pass a bill to provide for increases in social security payments even to offset the increases in the cost of living that have occurred during the past year, it cannot be accompanied by amendments relating to trade and the family assistance program." 116 Cong. Rec. 43625 (1970).

As a result, the vote to recommit was not a formal expression of support for or opposition to either the trade amendments or family assistance plan. To the contrary, that vote can only be read as an attempt to clear the way for passage of increased social security benefits by "stripping the Social Security Act of non-germane amendments." 116 Cong. Rec. 43645 (1970) (remarks of Senator Byrd).

Third, the timing of the proposed amendment undercuts the petitioner's argument. From the date of its original enactment, as a part of the Trade Agreement Extension Act of 1955, until 1973, Section 232(b) was used as authority only for imposition of a system of quotas. In 1970, the President's Cabinet Task Force on Oil Import Control suggested a radical departure from the practice and called upon the President to impose tariffs on imported oil. *The Oil Import Question* (1970). Respondents submit that the abortive Trade Act of 1970 was a reaction to the executive assertion of the existence of a tariff power. As such, it can be viewed as a reassertion of original legislative intent and a restatement of existing law, rather than an attempt to modify that law.

Similarly, petitioners' reliance on the 1958 report of the Office of Defense Mobilization as a guide to legislative intent is misplaced. First, that report was made to the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means. There is no indication that the report ever came to the attention of Congress in general or even the Committee as a whole. Under these circumstances, to ascribe knowledge of the report to Congress and infer legislative intent from that knowledge would be stretching the limits of logic. Furthermore, the report does not purport to be a statement of Presidential position and is instead a "compendium" or collection of papers addressing the problem. In the absence of such a statement of position the actions of Congress in reenacting the statute obviously cannot be construed as acquiescence or ratification of a non-legislative document. *Federal Maritime Commission* v. *Seatrain Line, Inc.*, 411 U.S. 726 (1973); *Zuber* v. *Allen*, 396 U.S. 168 (1969).

It therefore appears that the treatment afforded the legislative history of Section 232(b) by the Court of Appeals was proper and that the additional material presented in the petition for a writ of certiorari would not have affected that treatment.

III. Further Consideration of Petitioners' Claim is Inappropriate Because Respondents are Entitled to Relief for Procedural Violations Not Reached by the Court of Appeals.

In the decision of the Court of Appeals, Judge Tamm wrote, "we do not reach the procedural challenges that appellants have raised to the section 1862 investigation by defendant Simon, to the imposition of the program or to the FEA regulations" (Pet. at 28a). These challenges are substantial and in themselves would have required the lower court to conclude that the procedural prerequisites to a valid exercise of the powers conferred by the Trade Expansion Act and The Federal Energy Administration Act were not met. Further review is inappropriate since the respondents would prevail if the case were heard solely on the basis of the procedural violations alleged.

A. *Respondents are Entitled to Relief Because of Procedural Violations of Section 232(b).*

Section 232(b) of the Trade Expansion Act, 19 U.S.C. § 1862(b), contemplates specific procedural steps prior to the implementation of a program to adjust imports. Under this section, the Secretary of the Treasury is to conduct an investigation requesting opinions from the Secretary of Defense and other appropriate agencies. He is to hold public hearings or otherwise afford interested parties an opportunity to present information and advice if appropriate. The Secretary is then to assimilate this information and report his findings and his recommendations to the President.

Secretary Simon determined that public hearings were inappropriate due to national security considerations. Section 232(b), however, can only be relied upon when the importation of an article is threatening the national security. The "if appropriate" language must refer to something more than just national security; to hold otherwise would be to say that hearings are never appropriate under that section.

The entire investigation conducted by the Secretary took ten calendar days, and the intervention of two weekends suggests that any real investigation took place in an even shorter period of time. Deputy Under Secretary of Labor, Joel Segall, replied to the Treasury Department that the Department of Labor could not provide the requested material within the time period allotted for investigation. (App. 78). There is language in the report of Assistant Secretary of the Treasury, David R. MacDonald, to Secretary Simon and in Secretary Simon's report to the President indicating that a Presidential Proclamation was already being drafted before receipt of the recommendations.[3] Such a superficial and hasty investigation does not satisfy the requirements of the statute and serves instead as a post hoc rationalization of a predetermined course of action.

B. *Respondents are Entitled to Relief Because of Procedural Violations of the National Environmental Policy Act.*

Procedural safeguards were further ignored by the petitioners in their attempts to comply with the dictates of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321

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[3] The same sentence appears in both the MacDonald and Simon reports, "I understand that a Presidential Proclamation pursuant to Section 232 of the Trade Expansion Act of 1962 is being drafted by the Federal Energy Administration consistent with these recommendations." (App. 44, 63.)

et seq. NEPA was enacted to compel the thorough integration of environmental considerations into the decision-making process, in every instance in which an activity of the Federal Government would significantly affect the quality of the human environment. Council on Environmental Quality, Third Annual Report, 224-227 (1972). An after-the-fact Environmental Impact Statement (EIS), by its definition, violates the purpose of the statute because its contents could not possibly be considered in the decision-making process. Petitioners argued, however, that an after-the-fact EIS satisfies NEPA.

The requirements of NEPA must be complied with "to the fullest extent possible." Compliance is excused by that phrase only when there is a clear conflict with another statute. *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F. 2d 1109 (D.C. Cir. 1971). Because the EIS in this case was filed after the decision to impose a license fee system and because there is no express statutory conflict, petitioners clearly did not comply with the procedural requirements of NEPA.

C. *Respondents are Entitled to Relief Because of Procedural Violations of the Federal Energy Administration Act.*

Petitioners were afforded yet another opportunity to obtain public input by the hearing and notice provisions of the Federal Energy Administration Act (FEAA), 15 U.S.C. § 761 *et seq*. Once again the procedural safeguards were set aside on the unsupported assertion that an emergency existed.[4] The

[4] Section 7(c) of the Federal Energy Administration Act makes extensive provisions for notice to be given to the Cost of Living Council and for their approval or disapproval of the proposed regulation. Provisions are also made to obtain the comments of the Administrator of the Environmental Protection Agency. These provisions may be waived by the Administrator of the FEA for a period of 14 days, if he determines that the situation requires immediate action. 15 U.S.C. § 766(c). The FEA used the 14-day waiver provision without the specific assertion of an emergency.

determination of the existence of an emergency for purposes of waiving public hearings is committed by statute to the discretion of the Administrator. The Administrator's invocation of the FEAA's emergency waiver provisions in this case was contrary to the statutory terms, since he did not independently determine that an emergency existed. Instead, the President's State of the Union Message and Secretary Simon's determination that the national security was imperiled were relied upon to conclude that an emergency existed. 40 Fed. Reg. 4771 (1975). Moreover, the public input provisions of FEAA should be waived only in a true emergency situation:

> "Restraint is required against the temptation to take action on the ground that there is an emergency, when what is more significantly operative is the conviction that the action seems reasonable on an inspection of the file." *Pennsylvania Gas and Water Company* v. *Federal Power Commission*, 427 F. 2d 568, 574 (D.C. Cir. 1971).

That no true emergency existed in the instant case is amply demonstrated by the subsequent Presidential Proclamations deferring imposition of license fees and the FEA's deferral of payment policy.[5]

In *Environmental Defense Fund* v. *Ruckelshaus*, 439 F. 2d 584 (D.C. Cir. 1971), the court stated that procedural safeguards permitting an opportunity for hearing and comment in advance of agency action should not lightly be set aside. In the case at bar, petitioners invoked "national security" and emergency situation exceptions to supersede the procedural provisions of the Trade Expansion Act of 1962, as amended, of

[5] Pres. Proc. 4355, 40 Fed. Reg. 10437; Pres. Proc. 4370, 40 Fed. Reg. 19421; 40 Fed. Reg. 36302; 40 Fed. Reg. 42578 (1975).

FEAA. The Court of Appeals did not reach the questions raised by the blanket invocation of "national security." Had these questions been reached, they would have been dispositive of this case. The respondents would, therefore, have prevailed even if that court had found that the President and petitioners had acted within the scope of their powers under Section 232(b) of the Trade Expansion Act. The existence of this independent and adequate basis for the decision of the lower court is yet another reason why this Court should not grant the petition for certiorari.

If the petition is granted, respondents ask that the questions presented be expanded to include a consideration of these procedural violations.

Conclusion.

For all these reasons, respondents submit that the petition for a writ of certiorari should not be granted.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS,

v.

ALGONQUIN SNG, INC., ET AL.,
RESPONDENTS.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the
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No.

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS,

v.

ALGONQUIN SNG, INC., ET AL.,
RESPONDENTS.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Algonquin SNG, Inc., et al. oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above case. In accordance with Rule 40(3) as incorporated in Rule 24(1) of the Rules of the Supreme Court of the United States, Respondents do not include herein the items preliminary to argument covered in pages 1 through 11 of the Petition, except where Respondents are dissatisfied with the presentation.

Question Presented

Whether the President is authorized under Section 232(b) of the Trade Expansion Act of 1962 as amended (19 U.S.C. § 1862(b)) to impose a system of import license fees which has the effect of a tariff.

Reasons for Denying Review on Writ of Certiorari

I. CONTRARY TO THE ASSERTION OF PETITIONERS, THERE IS NO "QUESTION OF FUNDAMENTAL AND URGENT IMPORTANCE TO THE ECONOMIC WELL-BEING OF THE NATION . . . [WHICH] SHOULD BE RESOLVED BY THIS COURT." (PETITION, P. 11)

Respondents hereby specifically adopt the argument submitted by counsel for the Commonwealth of Massachusetts et al. on this issue (Reply Brief of Commonwealth of Massachusetts et al., Reasons for Denying Writ, No. I). Respondents regard the substantial withdrawal of the President's oil import license fee program as a major reason for denying certiorari. There are, moreover, other significant reasons why certiorari should be denied.

The Respondents agree that reduction of this country's dependence upon foreign oil is a very serious matter which should be given high priority by the executive and legislative branches. However, the decision of the Circuit Court does not impair the President's ability to deal with this problem. That decision deprives the President only of the asserted power to impose *indirect* methods of import controls, i.e. tariffs and fees. Accordingly, the President is deprived only of one among many methods of dealing with the foreign oil problem. The Court below was careful to point out that the President is not restrained by that Court's decision from restricting imports through the imposition of

direct import controls such as quotas. In the words of Judge Tamm for the Court below:

> "We also realize that the judicial branch was accused of straightjacketing the coordinate branches of Government in their attempt to alleviate the massive economic dislocation created by another grave crisis, the Great Depression. We do not believe that any such criticism would be justifiable here. The President could have moved against this problem on a unilateral basis through direct controls. Alternatively, he could have sought, as he has, additional measures from Congress." (Petition, App. A, p. 28a)

Petitioners in effect identify as a matter of fundamental and urgent national importance, the satisfaction of the President's wishes to employ license fees rather than quotas as a method of controlling the importation of foreign oil. While the President may not be pleased to employ quotas as a method of import control because of bureaucratic or political convenience,[1] it is nonetheless true that a system of oil import quotas will effectively reduce the volume of foreign oil.[2]

The President's objective has been to reduce domestic demand for petroleum indirectly through increased prices for domestic and foreign oil, either by import license fees

---

[1] The Affidavit of Eric R. Zausner, Deputy Administrator of the Federal Energy Administration, presented to the Court below on August 15, 1975, states that the President rejected the quota system and chose the fee system as "the most effective, least disruptive and publicly acceptable mechanism," a mechanism avoiding "the necessity for a vast bureaucracy." (Zausner Affidavit of Aug. 15, pp. 4-5)

[2] The question of quotas versus tariffs as a mechanism of import control is a complex one, not appropriate for grand generalizations such as the statement of Petitioners that quotas "have proved to be unsuitable and could cause artificial shortages and dislocation . . . ." (Petition, p. 11) *See*, "World Oil Developments and U.S. Oil Import Policies," A Report Prepared for the Committee

or price decontrol of domestic oil.[3] The expressed objective of the Congress, while less well-defined, is in large part contrary to the President's, as indicated by the recent bill to extend the Emergency Petroleum Allocation Act (S. 1849), and the adoption of the license fee moratorium bill (H.R. 1767), both passed by substantial majorities in Congress and vetoed by the President.

The fact is that the President and Congress are engaged in a debate over the implementation of U.S. energy policy. Implicit in Petitioners' argument is the claim that it is of fundamental and urgent national importance that the President's choice of action to deal with the oil crisis prevail over the congressional choice of action. Respondents respectfully submit that acceptance of this contention would lead this Court into making a political decision on energy policy of the sort currently being debated between Congress and the President.[4]

Furthermore, the Petitioners' assertion that the import license fee system is essential to the economic well-being of the nation is belied by their actions. The President, with characteristic candor, has acknowledged that the supplemental license fees were adopted in an effort to goad the Congress into action on energy legislation.[5] In addition, the Federal Energy Administration on September 22, 1975

on Finance by the U.S. Tariff Commission. T. C. Publication 632, at 110-146.

[3] Zausner Affidavit of August 15, 1975, pp. 3-4.

[4] It should be noted that th issue of whether this case posed a "political question" was thoroughly briefed before the District Court below. The government at that time conceded, and Judge Pratt found, that the controversy was not one "which the doctrine of separation of powers as well as prudence and good sense would cause us to avoid." (Petition, App. C, p. 39a)

[5] *See*, Presidential Remarks and Messages to House of Representatives, March 4, 1975, Weekly Compilation of Presidential Documents, Vol. II, No. 10, pp. 238-240; President's Letter to the Speaker of the House and the President of the Senate, April 30, 1975, Weekly Compilation of Presidential Documents, Vol. II, No. 18, pp. 467-8.

announced the permanent suspension of the supplemental license fees on petroleum products, effective September 1, 1975 (40 F.R. 44306, September 26, 1975). Surely a program vital to the national security and economic well-being of the nation would not be abandoned by the FEA.

Respondents respectfully submit that the judicial issue in this case is whether Congress ever authorized the Presidential oil import fee system, not whether it is urgent to the economic well-being of the nation that the President prevail in his preferred course of action in meeting the current crisis.

II. Petitioners Have Not Given Reason for This Court to Review the Careful Analysis by the Court of Appeals of the Legislative History of Section 1862(b) and the Decision of That Court That the Statute Does Not Authorize the Presidentially Imposed Oil Import Fees.

The Court of Appeals examined Section 1862(b) in the light shed by its general statutory context and "generalize[d] from . . . [its] examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-defined goals." (Petition, App. A, p. 13a) The Court concluded, "Fitted against this scheme, the Government interpretation of Section 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area." (Petition, App. A, p. 14a)

Petitioners reply only (Petition, pp. 16-17, § 3) that 19 U.S.C. 1981(a), the so-called "escape clause," conferred "analogous authority" on the President.[6] Petitioners do

[6] The "escape clause" was substantially revised and reenacted in Sections 201-203 of the Trade Act of 1974, P.L. 93-618, 88 Stat. 2011-2018.

not mention that the Court below specifically cited this clause (Petition, App. A, p. 13a) as representing one of the many provisions delegating tariff power in a narrow and explicit manner to the President, from which the Government interpretation of Section 1862(b) is "an anomalous departure." (Petition, App. A, p. 12a) As Petitioners and the Court below note, Section 1981(a), unlike Section 1862(b), delegated to the President a tariff adjustment power *in express terms*. Moreover, Petitioners neglect to call attention to the multiple ways in which the Section 1981(a) delegation of the tariff power was hedged about with specified congressional checks and limitations.[7]

The Court of Appeals considered the full range of legislative sources for the initial enactment of Section 1862(b), citing the Report of the Senate Committee in which the provision originated,[8] the Report of the Conference Committee,[9] and statements of various congressmen in the floor debate. The Court decided that "[i]n light of all factors . . . the single floor statement the Government may justifiably rely upon is a woefully slender reed to support its construction of the statute." (Petition, App. A, p. 19a) In rebuttal, Petitioners attempt only the semantic corruption of a statement by Senator Byrd to support their argument. (Petition, p. 13, n. 10) [10]

[7] Section 1981(a) could be invoked only by the narrow circumstances of a Tariff Commission finding of imports threatening a domestic industry "as a result in major part of concessions granted under trade agreements." (19 U.S.C. 1901(b)) The response of the President to said Tariff Commission finding under Section 1981(a) was subject to immediate congressional review and potential reversal. (1981(a)(2)) Most importantly, the President's tariff adjustment power under Section 1981(a) was limited to an increase of not more than 50% above the 1934 rate. (1981(b)) In comparison to the present case, the limit of 50% above the 1934 base rates was exceeded by even the "first tier" of oil import fees imposed by President Nixon.

The revisions made in the "escape clause" by the Trade Act of 1974 (idem.) circumscribe Presidential action thereunder with additional congressional controls.

[8] S. Rep. No. 232, 84th Cong., 1st Sess. (1955).

[9] Conf. Rep. No. 745, 84th Cong., 1st Sess. (1955).

The Court of Appeals examined the reenactments of Section 1862(b) and found particularly probative the congressional rejection of a proposed Section 353 to the Trade Expansion Act of 1962, which would have expressly given the President the tariff adjustment power now claimed under Section 1862(b) (108 Cong. Rec. 19875 (1962)). The Court concluded that the rejection of proposed Section 353 justified the double inference that Congress believed no other provision delegated such a tariff adjustment power and that Congress did not desire so to delegate its power. (Petition, App. A, pp. 19a et seq.)

Petitioners concede that the rejected Section 353 "would indeed have been an expansive delegation of authority to the President" (Petition, 15) but contend that Section 1862(b) is in comparison a narrow and limited delegation. Since Petitioners claim that Section 1862(b) like proposed Section 353 contains a Presidential tariff power, the distinction upon which they rely is that Section 1862(b) requires the finding of a threat to the "national security", whereas Section 353 would have required the finding of a threat to the "national interest." This distinction is captious when considered in light of (a) the infinite factors listed in Section 1862(c) as bearing upon the national security and (b) the fact, as the Court below noted, that

[10] The statement in question by Senator Byrd, made in response to a question by Senator Saltonstall which employed a similar grammatical construction, clearly represents a use of the word "or" synonymously with "namely" or "i.e." to explain the preceding expression:

> Mr. Saltonstall: This gives the opportunity to the President to adjust imports, *under restrictive conditions or quotas* . . . .
>
> Mr. Byrd: It simply leaves to the President the power, in his discretion, to *decide whether to impose a quota or to reduce the imports.*

(101 Cong. Rec. 5297 (1955); emphasis supplied).

Section 1862(b) applies to all commodities. (Petition, App. A, p. 14a)

Petitioners raise certain points with respect to the legislative history of Section 1862(b) for the first time in the Petition to this Court for writ of certiorari. In view of the heavy reliance upon these points in the Petition, it is anomalous that Petitioners did not see fit to present them to the courts below. Respondents respectfully submit that it is inappropriate to seek to impose such arguments upon this Court by way of review without the benefit of analysis by the Court of Appeals. A petition for rehearing was available if Petitioners claim points of law have been overlooked which are of crucial importance to the issues decided by the Court below.[11] The points raised for the first time by the Petition are discussed below.

First, Petitioners cite a report in 1958 of the Office of Defense Mobilization to a subcommittee of the House Ways and Means Committee [12] as authority for the intent of Congress in reenacting Section 1862(b) in that year. (Petition, pp. 13-15) Plainly, a statement made three years later is poor authority for the intent of Congress in 1955. As this Court said as recently as the last term, "subsequent legislative history" is not probative of legislative intent.

> "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Blanchette* v. *Connecticut General Insurance Corporations*, 419 U.S. 102, 42 L.Ed.2d 320, 347 (1974).

[11] Federal Rules of Appellate Procedure for the U.S. Courts of Appeals, Rule 40.

[12] "Foreign Trade Policy, Compendium of Papers on United States Foreign Policy, Collected by the Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means" (1958), pp. 643-648.

If even a statement by congressmen three years after passage would be poor authority, it is palpably improper to cite as legislative history a statement of a body in the executive branch which did not even have any authority over the matter.[13]

In regard to the reenactment of Section 1862(b) in the Trade Agreements Extension Act of 1958,[14] to ascribe probative value to the silence of Congress as to the statement of the ODM to a subcommittee of the House is even more farfetched than the argument from silence rejected by this Court in a criminal case in the last term. This Court stated,

> "In most circumstances silence is so ambiguous that it is of little probative force. . . . Failure to contest an assertion . . . is considered evidence only if it would have been natural under the circumstances to object to the assertion in question." *U. S.* v. *Hale*, —— U.S. ——, 45 L.Ed.2d 99, 104 (1975).

Clearly it would be unnatural to apply a rule of adoptive silence to every aberrant statement hidden in a report to congressional subcommittees.

Second, for the first time Petitioners cite the report in 1970 of the President's Task Force on Oil Import Control,[15] a subsequent proposal in Congress to amend Section 1862(b), and the proposal's deletion on the floor of the Senate, as premises yielding the conclusion that Congress acquiesced in the recommendation of the Task

[13] Under the statute in question, Section 1862(b), the role of the Office of Defense Mobilization was limited to investigating and informing the President when imports of an article were in quantities threatening the national security. The ODM had no mandate even to recommend to the President what action should be taken; clearly it had no authority to speak for Congress as to what actions were permitted.

[14] P.L. 85-686, 72 Stat. 673.

[15] *The Oil Import Question* (1970).

Force that the oil quotas be replaced with a system of tariff restrictions.[16] (Petition, p. 16) No such conclusion follows in logic and the essential additional premises are contradicted in fact. The Trade Expansion Act of 1962 was not reenacted in 1970, hence the Task Force Report represents an eight-years subsequent attempt to reconstrue the operative congressional intent — another example of nonprobative "subsequent legislative history" within the ruling in *Blanchette, supra.* The proposed amendment[17] to prohibit any adjustment of imports under Section 1862(b) through tariff modification was reported out of the Senate Committee on Finance as an amendment to the Social Security Act of 1970.[18] The amendment was deleted on a motion to recommit the entire Social Security bill to the Committee and clear the way for its passage by "stripping the Social Security Act of non-germane amendments." (116 Cong. Rec. 43625, 43645 (1970); remark of Senator Byrd at 43645). The deletion, hence, was a practical parliamentary move from which no inference should be permitted.

All in all, Petitioners have given no grounds for reviewing the statutory construction of the Court of Appeals and its careful analysis of the relevant legislative history.[19]

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[16] Three members of the Task Force opposed this recommendation so strongly that they wrote a minority report. The consequences of adopting the majority recommendation which the minority report predicted were well borne out in 1974 and 1975.

[17] H. R. Rep. No. 91-1435, 91st Cong., 2d Sess., 23 (1970).

[18] S. Rep. No. 91-1431, 91st Cong., 2d Sess., 36 (1970).

[19] Petitioners, it should be noted, take a position in fundamental disagreement with even the dissent in the Opinion of the Court of Appeals. Petitioners contend that the legislative history of Section 1862(b) "compels" the Government interpretation. (Petition, 12) The most that Circuit Judge Robb, dissenting, could say for the Government argument on this point was that "the legislative history of Section 232 [19 U.S.C. 1862(b)] is hopelessly ambiguous and inconclusive." (Petition, App., 31a)

III. The Petitioners Wholly Exclude From Their Discussion the Extensive Attention Given by the Court Below to Interpretive Considerations Other Than Legislative History.

Respondents respectfully submit that review by this Court on writ of certiorari is inappropriately requested where the decision of the Court of Appeals is dispositively governed by recent holdings of this Court. The Court below stated as one of the bases for its decision that "recent Supreme Court pronouncements mitigate against the expansive statutory construction advanced by the Government." (Petition, App. A, p. 12a)

Moreover, Respondents respectfully suggest that, for reason of time honored principles of interpretation relied upon by the Court below, it is unlikely that any court would accept the "expansive statutory construction" of Section 1862(b) for which Petitioners contend.

The statutory construction urged by Petitioners claims for the President implied powers of taxation which amount to a virtual abdication of the tariff power by the Congress. The expansive parameters of the President's implied powers of taxation as Petitioners construe Section 1862(b) are as follows: (a) By reason of the broad definition of "national security" in Section 1862(c), the President's power to "adjust imports" extends over virtually every article of commerce. (b) The President's asserted powers under Section 1862(b) include both the power to abolish completely congressionally established tariffs and to impose tariffs unlimited in amount — a claim of unbridled discretion without precedent in U.S. tariff legislation. (*See,* Proc. 4210, § 16; Proc. 4341, § 12). (c) The President's asserted powers include the power to impose a nonuniform tariff in contradiction of Article I, § 8, cl. 1 of the United States Constitution, through the unequal distribution of

fee-free oil allocations among the five geographical districts into which the States are divided. (*See,* Proc. 4210, § 15(b)-(e); Proc. 3279, § 2(a)) (d) The President's asserted power to impose tariffs would be essentially unreviewable by the judiciary since it involves a national security determination. (*C & S Airlines* v. *Waterman S.S. Corp.,* 333 U.S. 103 (1948); See also, *Sardino* v. *Fed. Res. Bank of N.Y.,* 361 F.2d 106 (2d Cir. 1966); *Werner* v. *U. S.,* 119 F. Supp. 894 (S.D. Cal., 1954)). (e) The President's exercise of these broad non-reviewable powers may not be rescinded by Congress — as recent experience indicates — except by overriding a Presidential veto by two-thirds vote of both Houses of Congress. The Court below could not accept that Congress, in authorizing the President to "adjust imports", intended to confer such unlimited, unprecedented and unreviewable executive powers.

The Court below found the Government's expansive construction of Section 1862(b) impermissible according to the reasoning of this Court in a case decided only last year — *National Cable Television Association, Inc.* v. *United States,* 415 U.S. 336 (1974). (*Accord, FPC* v. *New England Power Co.,* 415 U.S. 345 (1974)) In that case, this Court considered the validity of "runaway" license fees which exceed allocable administrative costs and the value to the recipient of the government services provided, and which thus invade the taxing power entrusted to Congress. The fees in that case were purportedly authorized by the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a, in the provision for assessment of fees in consideration of "public policy or interest served." This Court distinguished between a tax, which may be imposed by Congress arbitrarily in consideration of public policy, and a fee, which "is incident to a voluntary act, e.g., a request that a public agency permit him [an applicant] to

practice law or medicine or construct a house or run a broadcast station" (*Id.,* at 340) and which properly exacts a charge for the benefit bestowed. The Court stated that the assessment of fees in consideration of public policy "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriation Committee of the House." (*Id.,* at 341).

The Court below found the above reasoning of this Court dispositive of the present case:

> "We believe that this approach is dispositive, although the character of the 'fee' is different, of the claim of the legitimacy of charges imposed on imported petroleum under section 1862(b). We have already acknowledged that there could be an administrative 'fee' to cover the costs of administration. What we have here, however, is a regulatory charge, laid down by the Executive for policy reasons, carried far from the 'customary orbit' of a fee into broad domains of revenue. . . .
>
> "In sum, the President's expansive definition of a legitimate fee cannot be accepted. We must also conclude that the programs instituted by Presidents Nixon and Ford cannot be upheld as a proper license fee. To consider it as such would make a travesty of the term. It is, as the district court found, a 'regulatory measure' — an indirect control on imports — and thus outside the scope of section 1862(b)." (Petition, App. A, pp. 25a, 27a)

A fundamental rule of statutory construction is the rule reiterated by this Court in its last term:

> "[C]onstruction should go in the direction of constitutional policy . . . [W]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is

favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." (*Blanchette* v. *Connecticut General Insurance Corporations, supra,* at 348; citing *United States* v. *Johnson,* 323 U.S. 273, 276 (1944); and citing the court below, — F. Supp. — (1974))

An ancillary established principle of statutory construction is that statutes delegating the taxing power are to be narrowly construed. (Sutherland, *Statutory Construction,* § 66.05 (4th Ed., 1973)) Throughout our constitutional history the taxing power has been recognized as a dangerous instrumentality, the exercise of which must be carefully controlled. (*McCulloch* v. *Maryland,* 4 Wheat, 316 (1819).

It is important to note that no taxing power is mentioned at all in Section 1862(b). No rate of taxation is set forth, and no standard is present by which such a rate could be determined. The government in effect claims a spectrum of powers under Section 1862(b) which would have no reasonable limit, as long as such power would have an effect on imports. This claim could presumably encompass use of public funds as well as exercise of taxation powers. The government position is too far-flung and was rightly struck down by the decision below.

Respondents respectfully submit that the Petitioners' expansive construction of Section 1862(b) involves in the words of the Court below, "a massive assertion of executive authority in an area so thoroughly occupied by Congress [that it] requires careful scrutiny" (Petition, App. A, p. 14a), and that such a judicial scrutiny is dispositively resolved by rules of law reiterated in the decisions of the most recent term of this Court. Hence, no review is merited.

Conclusion

The petition for a writ of certiorari should be denied.

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No. 75-382

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL ENERGY ADMINISTRATION, ET AL., PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL., PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–32a) is reported at 518 F. 2d 1051. The opinion of the district court (Pet. App. 37a–49a), although not separately reported, appears as an appendix to the dissenting opinion of the court of appeals (518 F. 2d at 1064–1069).

JURISDICTION

The judgments of the court of appeals (Pet. App. 33a–36a) were entered on August 11, 1975. The petition for a writ of certiorari was filed on September 10, 1975, and was granted on November 3, 1975 (A. 402). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the present actions are barred by the Anti-Injunction Act.[1]

2. Whether Section 232(b) of the Trade Expansion Act of 1962 authorizes the President—upon a finding that oil is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security—to adjust the imports of oil by imposing a system of license fees on such imports.

STATUTES INVOLVED

Section 7421(a) of the Internal Revenue Code of 1954, 68A Stat. 876, as amended, 26 U.S.C. 7421(a), provides:

> Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877, as amended by Section 127(d) of the Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1993, 19 U.S.C. (Supp. IV) 1862(b), provides:

> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information, and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not

[1] This question was not presented in the petition for a writ of certiorari. The Court's order allowing certiorari directed the parties to brief and argue the applicability of the Anti-Injunction Act (A. 402).

being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

STATEMENT

1. Section 232(b) of the Trade Expansion Act of 1962 gives the President authority to adjust the imports of any article in the interest of national security. It provides that if, after "an appropriate investigation," the Secretary of the Treasury "finds that [an] article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President [unless he disagrees with the Secretary's finding] shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security" (19 U.S.C. (Supp. IV) 1862(b)).[2]

The substance of the provision was originally enacted as part of the Trade Agreements Extension Act

[2] Section 232(c) of the Act, 19 U.S.C. (Supp. IV) 1862(c), enumerates some of the "relevant factors" to be considered by the Secretary and the President in determining whether imports of an article threaten to impair national security. Those factors include "domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, * * * the requirements of growth of such industries * * * including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries * * *." That Section also provides that "the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security * * *."

of 1955, 69 Stat. 162. In 1959, following the failure of a program of voluntary oil import restraints,[3] the provision was invoked by President Eisenhower to establish the Mandatory Oil Import Program, a system of volumetric restrictions or quotas on imports of petroleum and petroleum products administered by the Secretary of the Interior (Pres. Proc. 3279, 24 Fed. Reg. 1781; A. 81–90). The program was designed to reduce this Nation's dependence on foreign oil, which the President determined was being imported in such quantities and at such low costs as to threaten to impair the national security by impeding the development of domestic production and refinery capacity (24 Fed. Reg. 1781; A. 211).

The Mandatory Oil Import Program did not fully achieve its objective. Domestic consumption continued to increase more rapidly than domestic production, and succeeding Presidents amended the program by increasing the import quotas to satisfy the growing domestic demand (A. 211–212).

In March 1969, President Nixon created a Cabinet task force to conduct a comprehensive review of oil import restrictions. Following an extensive examination of the question, including consideration of written public submissions totaling more than 10,000 pages, the task force concluded that the fixed quota system was not achieving its objectives and recommended that at an appropriate time the President substitute for it a system involving the imposition of

[3] See Cabinet Task Force on Oil Import Control, *The Oil Import Question*, p. 3 (1970).

a tariff. Cabinet Task orce on Oil Import Control, *The Oil Import Question,* pp. 2, 128, 131, 134–139 (1970).

In April 1973, President Nixon amended the program by suspending existing tariffs on oil imports and providing for "a gradual transition from the existing quota method of adjusting imports" to "a system of fees" to be paid by oil importers for licenses authorizing them to import specified amounts of petroleum and petroleum products (Pres. Proc. 4210, 38 Fed. Reg. 9645, 9646; A. 92). The new program was designed to provide a long-range economic incentive to increase domestic production and refinery capacity while allowing greater levels of imports than under the prior program (A. 212). It established a gradually increasing schedule of license fees, which by the end of 1975 were to amount to $0.21 per barrel for crude oil and $0.63 per barrel for most petroleum products (A. 97). It also established a gradually decreasing level of imports that would be exempt from the license fees; by 1980, the license fees were to be imposed with regard to all oil imports covered by the program (A. 93–96, 103–104).

2. On January 4, 1975, the Secretary of the Treasury initiated an investigation under Section 232(b) to determine the current effects on the national security of imports of petroleum and petroleum products (A. 154). The investigation revealed that our increasing dependence on foreign petroleum posed a grave threat to the Nation's military security and economic welfare, a threat that had been underscored by the oil embargo imposed in September 1973 by the Organization of Petroleum Exporting Countries and the subsequent quadrupling of the price of imported oil (A. 131–132). The Secretary concluded that a sudden recurrence of an embargo or other similar interruption "would have a prompt substantial impact upon our economic well-being" and that, "in the event of a world-wide political or military crisis" resulting in "a more complete interruption of the flow of imported petroleum," the total domestic production "might well be insufficient to supply adequately a war-time economy" (A. 132).

The Secretary accordingly found that oil was being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security, and he recommended to the President that "appropriate action be taken to reduce imports" in order "to promote a lessened reliance upon such imports, to reduce the payments outflow and to create incentives for the use of alternative sources of energy" (A. 133).

On January 23, 1975, President Ford issued Proclamation 4341, further modifying the method of adjusting imports of crude oil and oil products (40 Fed. Reg. 3965; A. 110–120). The President declared that he agreed with the finding of the Secretary of the Treasury and that he "judge[d] it necessary and consistent with the national security to further discourage importation [of petroleum and petroleum products] into the United States" and to provide further incentives for increasing domestic production and refinery capacity and for developing other sources of energy (40 Fed. Reg. 3966; A. 111).

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Recognizing that "the seriousness of the situation demanded immediate action" (A. 268) to reduce the Nation's dependence upon foreign oil, the President modified the existing license fee system, imposed a supplemental fee on all oil imports, and reinstated the oil tariffs that had been suspended in 1973. The proclamation increased the existing "first-tier" license fees to their maximum levels of $0.21 and $0.63 for imports in excess of the amounts that were excused from license fees under the existing program. In addition, the proclamation imposed on all imported oil, whether or not subject to the first-tier fees, a supplemental fee of $1.00 per barrel for oil entering on or after February 1, 1975, rising to $2.00 per barrel on March 1, 1975, and to $3.00 per barrel on April 1, 1975 (A. 112).[4]

The Federal Energy Administration thereafter amended its oil import regulations to implement the

[4] The proclamation authorized the Administrator of the Federal Energy Administration to reduce the fee payable for imports of certain refined products by an amount increasing to as much as $1.80 per barrel by April 1975 (40 Fed. Reg. 3968; A. 114).

The scheduled increases in the supplemental fee to $2.00 and $3.00 per barrel were subsequently deferred. See Pres. Proc. 4355, 40 Fed. Reg. 10437, A. 121–124; Pres. Proc. 4370, 40 Fed. Reg. 19421, A. 125–126. The $2.00 fee was later made effective as of June 1, 1975. Pres. Proc. 4377, 40 Fed. Reg. 23429, A. 127–130. The $3.00 fee was not imposed.

On January 3, 1976, after the President signed the Energy Policy and Conservation Act of 1975, he issued Proclamation 4412, 41 Fed. Reg. 1037, which eliminated the $2.00 supplemental fee but not the first-tier fees (see pp. 13–14, *infra*).

provisions of Proclamation 4341 (40 Fed. Reg. 4771–4776).

3. On January 27, 1975, respondents[5] brought actions in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the imposition of oil import license fees (A. 17–35, 42–58, 61–70). The complaints alleged that imposition of the fees was beyond the President's constitutional and statutory authority, that proper procedures were not followed, and that no proper environmental impact statement was prepared.

On respondents' motions for a preliminary injunction, the district court ruled that Section 232(b) of the Trade Expansion Act of 1962 "is a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security" (Pet. App. 44a). "[T]he license fee program," the court stated, "is one of a number of possible actions covered in the non-defined phrase 'to adjust imports' "; it was properly instituted as "a regulatory measure * * * for the protection of national security" (*id.* at 42a).[6]

[5] One set of respondents is composed of 10 utility companies that sell gas or electricity in the northeastern United States and one member of Congress. The other set is composed of nine states and the governors of eight of those states (Pet. App. 8a–9a and nn. 7–9).

[6] The court noted that respondents did not challenge "the President's determination that his program is required in the interests of national security" (Pet. App. 39a).

The court also found that all the procedural steps required by Section 232(b) had been followed (*id.* at 44a–45a) and that, "in view of the emergency nature of the problem and the need for prompt action" (*id.* at 47a), preparation of an environmental impact statement in advance of the proclamation had not been required under the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321, *et seq.* (*id.* at 46a–47a).

Accordingly, since "plaintiffs have not made a strong showing that it is likely that they will prevail on the merits," and since "any interference by way of injunctive relief would be inconsistent with the public interest," the district court denied the motions for preliminary relief (*id.* at 48a).[7]

4. Respondents' appeals were consolidated in the court of appeals with their petitions for review of the Federal Energy Administration's regulations,[8] in which they presented essentially the same contentions that they had raised in their complaints in the district court. The court of appeals, with one judge dissenting, reversed the judgment of the district court and remanded the cases with instructions to grant appropriate relief to respondents; it also set aside the Federal

[7] The district court thereafter ordered that its findings, conclusions, and order would constitute its final judgment in the cases (A. 344).

[8] The petitions for review were filed pursuant to Section 7(i)(2)(A) of the Federal Energy Administration Act of 1974, Pub. L. 93–275 88 Stat. 102, 15 U.S.C. (Supp. IV) 766(i)(2)(A).

Energy Administration's regulations (Pet. App. 1a–32a).[9]

The court of appeals reasoned that, although Section 232(b) authorizes the President, in the interest of national security, to "take such action * * * as he deems necessary to adjust the imports of [an] article," to give the statute the broad interpretation that its terms suggest "would be an anomalous departure" from "the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs" (*id.* at 12a). The court inferred from the legislative history that Congress intended, when it authorized the President to "adjust

[9] The court of appeals stayed the issuance of its mandate to and including September 15, 1975 (A. 400), to permit the filing of a petition for a writ of certiorari. The petition for a writ of certiorari was filed on September 10, 1975. On September 29,1 975, the court of appeals denied a motion to modify the stay (A. 401), and it has not issued its mandate.

After the court of appeals decided this case, several actions were filed in district courts seeking to enjoin further collection of the base and supplemental license fees. *E.g.*, *Amoco Oil Corp., et al.* v. *Zarb, et al.*, D.D.C., Civ. Action Nos. 75–1579, *et al.*; *Coastal States Gas Corp., et al.* v. *Federal Energy Administration, et al.*, S.D. Tex., Civ. Action Nos. 75–H–1668, *et al.* The district courts in those cases issued preliminary injunctions requiring the defendants to deposit the fees collected under the program in a special Treasury account and to invest the funds in interest-bearing government bonds so that the fees will be available for possible refund in the event that the judgment of the court of appeals in the present case is affirmed.

the imports of [an] article," to permit the use only of "direct controls" (*id.* at 16a), such as quotas, and to exclude the use of "indirect controls" (*id.* at 22a), such as license fees (*id.* at 27a–28a). The court therefore concluded that "the two-tier program of license fees initiated by Presidents Nixon and Ford are beyond the scope of their [Section 232(b)] authority and cannot stand" (*ibid.*).[10]

Judge Robb dissented, observing (*id.* at 30a–31a):

> The statute authorizes the President to "take such action . . . as he deems necessary to adjust . . . imports", without purporting to limit in any way the kind of action available to the President. Admittedly, quotas have a direct effect on imports, whereas license fees have an indirect effect. But both affect imports, and I cannot see how the plain and broad language of section 232(b) can be read to limit the President to the use of one or the other.

5. On December 22, 1975, the President signed the Energy Policy and Conservation Act of 1975, Pub. L. 94–163, 89 Stat. 871, which is designed, in part, to "decrease dependence upon foreign [oil] imports" and "enhance national security" (S. Rep. No. 94–516, 94th Cong., 1st Sess. 117 (1975)). Title I of the Act provides for the creation of a strategic petroleum reserve to "diminish the vulnerability of the United

[10] The majority found it unnecessary to decide whether the statute, if more broadly interpreted, would be an unconstitutional delegation (Pet. App. 28a). It also did not reach respondents' procedural challenges to the proclamation and the implementing regulations (*id.* at 10a, n. 11, 28a) and did not discuss the need for an environmental impact statement.

States to the effects of a severe energy supply interruption" (89 Stat. 881). Title IV establishes a petroleum pricing policy that provides for gradual decontrol of the price of domestically-produced crude oil.

On January 3, 1976, the President issued Proclamation 4412 (41 Fed. Reg. 1037),[11] modifying the license fee program in light of the Energy Policy and Conservation Act, which, according to the proclamation, "establishes programs to reduce the vulnerability of the United States to interruptions in the importation of petroleum" and "provides for a system of price controls which will allow gradual increases in the cost of domestic petroleum to levels substantially above those which prevail at present and should, in the long term, promote petroleum conservation and tend to discourage the importation into the United States of petroleum and petroleum products" (*ibid.*; App., *infra,* pp. 1a–2a).

The President determined that "the purposes of the supplemental [oil import license] fee will be served by such legislation" and that "it is consistent with the national security to eliminate the supplemental fee effective December 22, 1975" (*id.* at 2a). At the same time, however, the President determined to retain the base fees "in order to offset the relative advantages of locating refining capacity abroad, and to carry out the other long term objectives of the import program established pursuant to Proclamation No. 4210" (*ibid.*).

[11] The proclamation is reproduced as an appendix to this brief, *infra*, pp. 1a–4a.

The result is that the supplemental fee of $2.00 per barrel on imported petroleum and petroleum products has been eliminated with respect to imports made on or after December 22, 1975, but that the base fees of $0.21 and $0.63 per barrel remain in effect.[12]

SUMMARY OF ARGUMENT

I

The Anti-Injunction Act, 26 U.S.C. 7421(a), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." Both the district court actions and the petitions for review in the court of appeals are "suit[s] for the purpose of restraining the assessment or collection" of the oil import license

[12] To the extent that the complaints in the district court and the petitions for review in the court of appeals sought prospective relief from imposition and collection of the supplemental fees, they appear now to be moot. At least the utility companies' complaint, however, sought to enjoin the imposition and collection of the base fees as well as the supplemental fees (A. 62–63, 69–70). Since the proclamation did not affect the base fees, that aspect of the case remains alive and the question presented remains in controversy. The court of appeals should consider on remand whether other aspects of the case have been mooted and, if so, what the consequences should be for this litigation.

The new legislation and proclamation have not reduced the importance of the issue presented in the petition for a writ of certiorari in this case. The President is not precluded from reinstituting the supplemental license fee in the future if he determines that such action is necessary to protect the national security, and the disposition of the fees paid into the special Treasury account (see note 9, *supra*) is still in issue. It is no less important now than it was at the time the petition was filed to clarify the President's authority under Section 232(b).

fee. The suits are not barred by the statute, however, because the license fee, even if it may properly be characterized as a tax, is not the kind of tax to which the Anti-Injunction Act applies.

As we read the provisions of the Internal Revenue Code, Section 7421(a) is applicable only with respect to taxes imposed under the Internal Revenue Codes of 1954 and 1939. The legislative history of the Section, which originated in 1867 as an amendment to an internal revenue law, appears to support that interpretation. Since the import license fee was not imposed under the Internal Revenue Code, the Anti-Injunction Act is not a jurisdictional bar to the present actions.

II

A. Section 232(b) of the Trade Expansion Act of 1962 authorizes the President, when he finds that the imports of an article threaten to impair the national security, to "take such action * * * as he deems necessary to adjust the imports of such article" to eliminate the threat. The statute prescribes the objective of the President's action but does not limit in any way the kind of action he may take to accomplish that objective. Nothing in the statutory text supports the court of appeals' distinction between "direct" (or quantitative) and "indirect" (or monetary) import controls. Either may be used to adjust imports when the President deems it necessary to protect the national security.

B. (1) The legislative history of the statute fully supports that conclusion. The substance of what is

now Section 232(b) was originally enacted as part of the Trade Agreements Extension Act of 1955. For some years there had been a growing concern in Congress that increased imports of defense-related raw materials—including oil and other mineral resources—were endangering the national security by reducing our own capacity to produce such materials in the event that international hostilities caused an interruption in foreign supply.

Some persons believed that the solution was to *reduce* trade barriers and to stockpile critical materials. Others sought to *increase* import restrictions—in the form of quotas or tariffs—in order to stimulate domestic production. Many specific proposals to protect individual industries were presented to Congress.

Section 232(b) represented a compromise. Rather than fixing the nature and level of import restriction for each industry that sought legislative protection, Congress determined to give the President broad authority, not only to decide whether imports of a particular article are threatening to impair the national security, but also to take whatever action he deems necessary to adjust the imports of such an article to eliminate that threat. Senator Millikin, co-author of the provision (which originated as a Senate amendment to a bill passed by the House), stated on the floor of the Senate that it would authorize the President to "use tariffs, quotas, import taxes, or other methods of import restriction" (101 Cong. Rec. 5299). The statements of Senator Byrd, the other author of the compromise provision, were to the same

effect. The chairman of the House Ways and Means Committee, during debate on the conference report, likewise indicated that the Senate amendment would permit the President to use either quantitative or monetary controls. And both chambers approved the bill after receiving a letter from the President's Special Counsel, which stated that, under the Byrd-Millikin national security provision, the President's action to adjust imports "could take any form that was appropriate to the situation" (*id.* at 8162, 8243).

(2) When the provision was reenacted in 1958, Congress was aware of the President's view that the existing law authorized the imposition of different types of controls to adjust imports, including tariffs as well as quotas. Although Congress undertook to prescribe the procedure to be followed and the factors to be considered by the President in making a national security determination, it did not restrict what it recognized to be the President's broad authority to choose the means of adjusting the imports of an article once he has made such a determination.

The same provision was carried forward in the Trade Expansion Act of 1962. In 1970, a special task force advised the President that he should exercise his authority under Section 232(b) to abandon the system of quotas on imports of petroleum and petroleum products and to substitute a system of tariff restrictions. Congress thereafter failed to enact an amendment to Section 232 that would have precluded any adjustment of imports by the imposition of a duty or fee.

In April 1973, President Nixon followed the advice of the task force and replaced the oil import quota system with a license fee system. In the face of that assertion of statutory authority, Congress reenacted Section 232(b) without material change in the Trade Act of 1974. That reenactment, confirming the President's authority to take whatever action he deems necessary to adjust imports in the interest of national security, must be viewed, in the circumstances, as a congressional ratification of the correctness of the executive interpretation of the scope of that authority.

C. Although the President's authority to impose import controls under some other statutes is more circumscribed than it is under Section 232(b), that is not a reason to construe Section 232(b) more narrowly than its terms and history require. The breadth and flexibility of the authority conferred on the President by Congress in the area of foreign trade reflect the nature of the national interest at stake. Congress intended in Section 232(b) to give the President the power to choose from among a wide range of possible actions to adjust imports, in order that he have the flexibility of response necessary to meet the changing needs of national security.

ARGUMENT

I

THE ACTIONS ARE NOT BARRED BY THE ANTI-INJUNCTION ACT

In its order granting the petition for a writ of certiorari in this case, the Court directed the parties

to brief and argue the applicability of the Anti-Injunction Act, 26 U.S.C. 7421(a). That statute provides, with exceptions not relevant here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *."

In our view, both the district court actions and the petitions for review in the court of appeals may be characterized as "suit[s] for the purpose of restraining the assessment or collection" of the oil import license fees at issue here. See *Bob Jones University* v. *Simon*, 416 U.S. 725; *Alexander* v. *"Americans United", Inc.*, 416 U.S. 752. We are doubtful, however, to what extent the oil import license fee could properly be characterized as a tax. Although the license fee resembles a tax insofar as it operates as a revenue-producing levy (cf. *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 606), and resembles a customs duty insofar as it is assessed against the importation of goods (cf. *Brown* v. *Maryland*, 12 Wheat. 419, 436–437), it is imposed for regulatory purposes under a statute designed to protect the national security (cf. *United States* v. *Butler*, 297 U.S. 1, 61). But we find it unnecessary here to determine whether as a general matter the license fee is most appropriately viewed as a tax, a customs duty, or a regulatory exaction, for, as we now show, even if the fee were to be characterized as a "tax" it nevertheless would not be the kind of "tax" the assessment or collection of which is protected from restraint under the Anti-Injunction Act.

Section 7851 of the Internal Revenue Code of 1954, which governs the applicability of the provisions of the 1954 Code, indicates that Section 7421(a), the anti-injunction statute, applies only to suits brought to restrain assessment or collection of taxes imposed by either the 1954 Code or the Internal Revenue Code of 1939. Section 7421(a) is contained within Chapter 76 (Judicial Proceedings) of Subtitle F (Procedure and Administration) of the 1954 Code. Section 7851 (a)(6)(A) provides that Subtitle F applies with respect to all taxes imposed under the 1954 Code.[12] But it further provides that Subtitle F does not apply with respect to taxes imposed under the 1939 Code, except as subsections (B) and (C) otherwise provide. Subsection (C)(iv) does otherwise provide, by making Chapter 76 applicable in its entirety with respect to 1939 Code taxes.

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[12] Section 7851 provides in relevant part:

"*Applicability of revenue laws.*

"(a) *General rules.*

"Except as otherwise provided in any section of this title—

* * * * * *

"(6) *Subtitle F.*

"(A) *General rule.*

"The provisions of subtitle F shall take effect on the day after enactment of this title and shall be applicable with respect to any tax imposed by this title. The provisions of subtitle F shall apply with respect to any tax imposed by the Internal Revenue Code of 1939 only to the extent provided in subparagraphs (B) and (C) of this paragraph.

* * * * *

"(C) *Taxes imposed under the 1939 Code.*

"After the date of enactment of this title, the following provisions of subtitle F shall apply to the taxes imposed by the Internal Revenue Code of 1939, notwithstanding any contrary provisions of such code:

* * * * *

"(iv) Chapter 76, relating to judicial proceedings."

Accordingly, the anti-injunction statute explicitly applies to suits brought with respect to taxes imposed under both the 1954 and the 1939 Codes. But since that anti-injunctioin statute would not have applied even with respect to 1939 Code taxes but for the specific savings provision to that effect in Section 7851, and since Congress did not make similar provision for its applicability with respect to any other taxes, it is reasonable to conclude that Congress did not intend that statute to apply to suits brought with respect to taxes other than those imposed under the 1954 and 1939 Codes.

This conclusion is reinforced by the legislative history of the Anti-Injunction Act. The Act originated as Section 10 of the Act of March 2, 1867, 14 Stat. 475, amending Section 19 of the Act of July 13, 1866, 14 Stat. 152, which itself had amended the Act of June 30, 1864, 13 Stat. 233, "An Act to provide Internal Revenue to support the Government, to pay Interest on the Public Debt, and for other Purposes." Section 10 of the 1867 Act added to the earlier statute the clause that appears in italic:

> That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months

> from the time of said decision, or within six months from the time this act takes effect: *Provided,* That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal. *And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.*

Although the original portion of the statute—the antecedent of Sections 6532(a) and 7422(a) of the Internal Revenue Code of 1954—itself barred suits "for the recovery of *any* tax" (emphasis added), both the context (an act to raise internal revenue) and the requirement of an appeal to the Commissioner of Internal Revenue, whose authority related only to internal revenue taxes (Act of July 1, 1862, 12 Stat. 432–433), indicate that in enacting the statute in 1864, and in amending it in 1866 and 1867, Congress was concerned only with internal revenue taxes and did not contemplate that the provisions of the statute would fix the procedures applicable to other taxes as well.

When the provisions of that statute were codified and enacted as Sections 3224, 3226, and 3227 of the Revised Statutes, Sections 3226 and 3227 (which embodied the original portion of the earlier statute) were expressly made applicable only to suits "for the recovery of any *internal* tax" (emphasis added). Section 3224 (embodying the 1867 anti-injunction amendment) did not include the word "internal." It provided: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This Court has recognized, however, that the separation of the provisions in the Revised Statutes was without significance, and that the anti-injunction provision of Rev. Stat. 3224 must be read *in pari materia* with Rev. Stat. 3226 and 3227. *Snyder* v. *Marks,* 109 U.S. 189. Thus, in *Pacific Steam Whaling Co.* v. *United States,* 187 U.S. 447, involving a challenge to a license tax requirement, the Court, after alluding to "the familiar doctrine that an injunction will not lie to restrain the collection of a tax on the mere ground of its illegality" (187 U.S. at 451–452), noted that, "in respect to *internal revenue* taxes," Rev. Stat. 3224 specifically bars a suit for that purpose (*id.* at 452; emphasis added).

When Congress enacted the Internal Revenue Code of 1939, it provided in Section 4 of the enacting provisions that the Code was intended to include all general laws "relating exclusively to internal revenue" (53 Stat. 1) and that existing laws codified in the Code were therefore repealed "to the extent they relate exclusively to internal revenue" (*ibid.*). The inclusion of Section 3653(a), the predecessor of Section 7421(a) of the 1954 Code, suggests that the provision was viewed as "relating exclusively to internal revenue."

In *Bob Jones University* v. *Simon, supra,* this Court ruled that Section 7421 is not limited to the assessment or collection of federal income taxes but applies as well to federal social security and unemployment taxes, stating that "Section 7421(a) speaks of 'any tax'; it does not differentiate between federal income taxes or FICA or FUTA taxes" (416 U.S.

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at 739). Both FICA and FUTA taxes, however, are imposed by the Internal Revenue Code of 1954 (see 26 U.S.C. 3101, *et seq.*, 3301, *et seq.*). Accordingly, the Court's holding in *Bob Jones* does not require a broader reading of the Anti-Injunction Act than its history suggests is appropriate.[14]

We conclude that the bar of Section 7421(a) is inapplicable to this case. The oil import license fees at issue here were imposed by Presidential Proclamations under the authority conferred by the Trade Expansion Act of 1962, as amended by the Trade Act of 1974. Whatever may be the validity of the fees, and however one may wish to characterize them, it is clear that they were not imposed by the Internal Revenue Code of 1954 or 1939. It follows that the present actions, though aimed at restraining the collection of

[14] Some lower federal courts have stated that the Anti-Injunction Act bars suits to restrain the collection of customs duties, which are not imposed by the Internal Revenue Code. See *J. C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d 63, 68 (C.A. 2), certiorari denied, 404 U.S. 869; *Horton* v. *Humphrey*, 146 F. Supp. 819, 821, n. 5 (D. D.C.) (three-judge court), affirmed *per curiam*, 352 U.S. 921. In *Penney* and *Horton*, however, the statements were unnecessary to the decisions, because the courts correctly ruled that suits challenging import duties imposed under the customs laws and administered by the Secretary of the Treasury must be brought in the Customs Court. See 28 U.S.C. 1340, 1582(a). It appears from the courts' opinions, moreover, that the applicability of the Anti-Injunction Act with respect to exactions imposed other than by the Internal Revenue Code was not put in issue by the parties. In neither case was the court's statement supported by analysis. See also *Moon* v. *Freeman*, 245 F. Supp. 837, 839 (E.D. Wash.) (three-judge court), where, in reliance upon *Horton*, the court ruled that the Anti-Injunction Act would bar injunctive relief against the imposition of "a duty on exports" imposed under the Agricultural Adjustment Act of 1938.

the license fees, are not precluded by the Anti-Injunction Act.[15]

II

SECTION 232(b) AUTHORIZES THE PRESIDENT TO ADJUST THE IMPORTS OF OIL BY IMPOSING A SYSTEM OF LICENSE FEES ON SUCH IMPORTS

When the Secretary of the Treasury formally advises the President that an article is being imported in such quantities or under such circumstances as to threaten to impair the national security, Section 232 (b) of the Trade Expansion Act of 1962 directs the President, unless he disagrees with the Secretary's finding, to "take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security * * *."

The question presented here is narrow. The Secretary of the Treasury found that oil was being imported into the United States in such quantities and under such circumstances as to threaten to impair

[15] While we therefore see no jurisdictional bar to the present actions, we note that injunctive relief in the district court may nevertheless be unavailable under settled principles of equity jurisprudence. Wholly apart from the provisions of the Anti-Injunction Act, "the rule generally followed in courts of equity [is] * * * that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality"; the complainant must show in addition that "there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence * * *." *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509; see also *Pacific Steam Whaling Co.* v. *United States*, *supra*, 187 U.S. at 451–452.

the national security, and the correctness of that finding is not contested (see Pet. App. 10a).[16] Nor is there any dispute over the correctness of the executive determination that the imposition of a system of license fees would serve to eliminate that threat to the national security (see *id.* at 39a). The issue is solely whether the imposition of such a system of license fees was within the scope of presidential authority under the statute to "take * * * action * * * to adjust * * * imports."

A. THE BROAD LANGUAGE OF THE STATUTE DOES NOT LIMIT THE KIND OF ACTION THAT THE PRESIDENT MAY TAKE TO ADJUST THE IMPORTS OF AN ARTICLE IN THE INTEREST OF NATIONAL SECURITY

Section 232(b) broadly confers upon the President the authority to *"take such action * * * as he deems necessary* to adjust the imports of [an] article and its derivatives so that such imports will not threaten to impair the national security" (emphasis added).

The President's range of choice with respect to the corrective actions that he may take under the provision is subject to only one limitation. The President must deem the action to be necessary to accomplish the prescribed objective of adjusting the imports of the article to eliminate the threat to the national security. The statute does not otherwise limit in any way the nature of the action that the President may take. Nothing in the statutory language places the

[16] In the court of appeals' words, this Nation's "increasingly dangerous dependence on foreign petroleum" (Pet. App. 10a) presents a "grave crisis" implicating "nothing less than our country's economic freedom and survival" (*id.* at 28a).

imposition of import license fees outside the scope of the President's authority to adjust imports.

Although the court of appeals concluded that Congress must have *intended* to confer on the President only the limited authority to impose "direct" import controls (such as quotas or other quantitative restrictions) and not "indirect" controls (such as license fees or other monetary exactions), it did not profess to find any basis for that conclusion in the *language* of Section 232(b). As Judge Robb correctly stated in his dissenting opinion, one "cannot find any such distinction in the statute," which does not purport "to limit in any way the kind of action available to the President" (Pet. App. 30a). Although "quotas have a direct effect on imports, whereas license fees have an indirect effect, * * * both affect imports" (*ibid.*). There is no basis in the statutory text for limiting "the President to the use of one [kind of action] or the other" (*id.* at 30a–31a).

The interpretation thrust upon the statute by the court of appeals limits the President's statutory authority to adjust imports, in order to meet a threat to the national security, to the imposition of quotas or other quantitative restrictions. But the finding that triggers the President's authority under Section 232 (b) is that an "article is being imported into the United States in such quantities *or under such circumstances* as to threaten to impair the national security" (emphasis added). As that language reflects, Congress recog- nized that "it is not only the quantity of imports that may have consequences for the national security,

but also the circumstances under which they are coming in: their use, their availability, their character." 104 Con. Rec. 10542–10543 (remarks of Rep. Mills). Under the court of appeals' holding, the President would be limited to the use of direct, quantitative controls even if, as in this case, the threat involved both quantitative and non-quantitative considerations and the President determined that quantitative controls would be ineffective to eliimnate the threat (see pp. 5–7, *supra*).

The majority of the court of appeals felt driven to this extraordinary result by its reading of the statute's legislative history and by its understanding of the manner in which Congress historically has delegated to the President control over foreign trade and tariffs. We doubt that anything less than an overwhelming showing of legislative purpose could justify what amounts to a judicial rewriting of the statute, particularly when the modification appears to produce an illogical result. As we demonstrate in the following sections of the brief, however, neither of the considerations that the court of appeals found significant supports its conclusion. To the contrary, both confirm that Section 232(b) confers the broad authority that its language suggests.

B. THE LEGISLATIVE HISTORY OF SECTION 232(b) DEMONSTRATES THAT CONGRESS INTENDED TO AUTHORIZE THE PRESIDENT TO TAKE ANY ACTION WITH RESPECT TO IMPORTS—INCLUDING IMPOSITION OF MONETARY EXACTIONS—THAT HE DEEMS NECESSARY TO PREVENT IMPAIRMENT OF THE NATIONAL SECURITY

1. *Background.*

In the Trade Agreements Act of 1934, 48 Stat. 943, Congress authorized the President, upon a finding by

him that existing duties or other import restrictions of this country or other countries were unduly burdening or restricting the foreign trade of the United States, to enter into reciprocal trade agreements with foreign countries and to modify existing duties and other import restrictions in accordance with such agreements.[17] That authority, originally granted for a period of three years (48 Stat. 944), was extended by Congress in substantially the same form several times prior to 1951. See. H.R. Rep. No. 14, 82d Cong., 1st Sess. 14–19 (1951).

Beginning in 1943, the trade agreements entered into by the President included a clause (called an "escape clause") permitting either party to modify or withdraw a trade concession if, as a result of unforeseen circumstances, the concession led to imports of an article in such increased quantities and under such circumstances as to cause or threaten serious injury to a domestic industry (*id.* at 13). The clause allowed partial or complete withdrawal of the concession, imposition of an import quota, or imposition of a rate of duty even higher than that in effect prior to the concession (*ibid.*).

Because of concern over the need to protect domestic industries during a period of defense mobilization, when domestic producers were subject to short-

[17] The term "duties and other import restrictions" was defined to include "(1) rate and form of import duties and classification of articles, and (2) limitations, prohibitions, charges, and exactions other than duties, imposed on importation or imposed for the regulation of imports" (48 Stat. 944).

ages of essential materials,[18] Congress enacted as part of the Trade Agreements Extension Act of 1951 a provision requiring that an escape clause be included in all future trade agreements and establishing a formal procedure for investigating the need to invoke the provisions of an escape clause (65 Stat. 73-75).[19]

At about the same time, some members of Congress and officers of the executive branch voiced concern that the country's increasing dependence upon foreign sources of critical raw materials, including oil, was jeopardizing the national security by risking a sudden reduction in supply in the event of war or national emergency. The President's Materials Policy Commission on Resources and Freedom (the Paley Commission), appointed in 1952 by President Truman, recommended in a report transmitted to Congress (see 98 Cong. Rec. 8705) that tariff barriers to trade in critical raw materials be lowered and that the Nation undertake to stockpile these materials for use in time of war or national emergency.[20]

Later, a commission appointed by President Eisenhower to study the Nation's foreign economic policy similarly recommended that domestic sources of raw materials for military needs "should be assured by direct means [*e.g.*, stockpiling] and not by tariffs and import quotas," H.R. Doc. No. 360, 83d Cong., 2d Sess. 7 (1954). A Special Cabinet Committee on Minerals Policy also recommended increased stockpiling (102 Cong. Rec. 4115). An Advisory Committee on Energy Supplies and Resources Policy, also appointed by President Eisenhower, recommended that if imports of crude and residual oils increased above a specified level some effort should be made through a voluntary program to limit such imports (see 101 Cong. Rec. 2365).

Some members of Congress favored *increased* trade barriers, rather than stockpiling, to stimulate domestic production of critical materials. A bill introduced in the House in 1953 would have amended the escape clause provision to allow withdrawal or modification

[18] See 97 Cong. Rec. 1074–1077; S. Rep. No. 299, 82d Cong., 1st Sess. 5–6 (1951). The provisions were also responsive to concerns that the standard escape clause was ambiguous and unworkable and therefore did not adequately protect domestic industries. See H.R. Rep. No. 14, *supra*, at 23; 97 Cong. Rec. 1075 (remarks of Rep. Bailey).

[19] The Act provided that, upon a finding by the Tariff Commission that "a product on which a concession has been granted is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products," the President "may make such adjustments in the rates of duty, impose such quotas, or make such other modifications as are found and reported by the Commission to be necessary to prevent or remedy serious injury to the respective domestic industry" (65 Stat. 74). Similar escape clause provisions were enacted as part of subsequent legislation. See 19 U.S.C. 1901–1902, 1981. More general provisions for relief from injury caused by import competition were recently enacted as part of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 2011–2018, 19 U.S.C. (Supp. IV) 2251–2253.

[20] See Hearings on Stockpile and Accesssibility of Strategic and Critical Materials to the United States in Time of War before the Special Subcommittee on Minerals, Materials, and Fuels Economics of the Senate Committee on Interior and Insular Affairs, 83d Cnog., 2d Sess., Part 8, p. 107 (1954). A staff study of the Paley Commission report is reproduced in the hearings (*id.* at 107–370).

of a trade concession if it resulted in 'impairment to national security," would have imposed import quotas on petroleum that could be modified or suspended by the President if necessary to meet domestic demand, and would have imposed increased but flexible tariffs on imports of other raw materials. See H.R. Rep. No. 777, 83d Cong., 1st Sess. 3, 7–9 (1953).[21]

The Trade Agreements Extension Act of 1954 contained a provision (the Symington Amendment) that reflected the concern over national defense requirements. It precluded reductions in duties "on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements" (68 Stat. 360).[22]

2. *The Trade Agreements Extension Act of 1955.*

a. During congressional hearings on the Trade Agreements Extension Act of 1955, several witnesses testified that increased imports were damaging industries that employed workers with critical skills and that injury to those industries could endanger the Nation's security in time of war or national emergency when persons with such skills would be needed. See Hearings on Trade Agreements Extension before the House Committee on Ways and Means, 84th Cong., 1st Sess. 178–179, 194–195, 883–885, 1000, 1006–1013 (1955) (hereinafter "84th House Hearings"); Hear-

[21] The bill was ultimately recommitted (99 Cong. Rec. 9708) and was not enacted into law.

[22] For the current version of that provision, see 19 U.S.C. 1862(a).

ings on Trade Agreements Extension before the Senate Committee on Finance, 84th Cong., 1st Sess. 878–888, 904–911 (1955) (hereinafter "84th Senate Hearings"). Witnesses also testified that additional protection against foreign competition, in the form of import quotas or increased tariffs, was needed for domestic industries producing oil, coal, and mineral resources in order to preserve the country's capacity to produce such critical raw materials in the event of war or national emergency. See 84th House Hearings 1051–1054, 1266, 1308–1309, 1327–1328, 2118–2124; 84th Senate Hearings 113–115, 331–335, 602, 721.

The House Committee ultimately concluded that the Symington Amendment (see p. 32, *supra*) provided adequate protection to industries essential to the national defense. H.R. Rep. No. 50, 84th Cong., 1st Sess. 44 (1955).

The Senate Committee reached a different conclusion. The Committee had before it several amendments designed to protect one or more specific industries, including an amendment proposed by Senator Neely "to place a reasonable limit upon the foreign oil which is flooding the United States" (101 Cong. Rec. 2314). The Neely Amendment would have provided for the imposition of quotas on petroleum imports and would have added to the Symington Amendment the following additional provision:

> [T]he President shall take such action as is necessary to restrict imports of commodities whenever such imports threaten to retard the

> domestic development and expansion or maintenance of domestic production of natural resource commodities or any other commodities which he determines to be essential to the national security * * *. [84th Senate Hearings 1032–1033.]

That provision, as described during the hearings by a co-sponsor, Senator Martin, would have authorized the President, upon the proper findings, "to take such action as is necessary, including the imposition of import quotas *or the increase in duties,* to protect the domestic industry concerned" (84th Senate Hearings 2097; emphasis added).[23]

The bill reported by the committee contained a provision referred to as the Byrd-Millikin Amendment,[24] apparently a substitute for the Neely Amendment,[25] which would have authorized the President—upon a determination by the Director of the Office of Defense Mobilization that he "has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security," and if the President, after an investigation,

[23] Senator Martin added that the provision was meant to apply not only to the coal and oil industries but also to "any industry essential to defense such as lead and zinc, chemicals, fluorspar, textiles, electrical equipment, machine tools and the watch industry" (84th Senate Hearings 2097).

[24] See, *e.g.*, 101 Cong. Rec. 5307 (remarks of Senator Robertson); *id.* at 5572 (remarks of Senator Humphrey). Senator Byrd was chairman of the Committee on Finance, and Senator Millikin was the ranking minority member and a former chairman.

[25] See 101 Cong. Rec. 5390, 5600 (remarks of Senator Daniel); *id.* at 5603 (remarks of Senator O'Mahoney).

"finds the existence of such facts"—to "take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security." S. Rep. No. 232, 84th Cong., 1st Sess. 14 (1955).

That provision, which was ultimately enacted with minor modification, was explained by the committee as follows (*id.* at 4; emphasis added):

> * * * The committee had before it several proposals dealing with specific commodities, namely petroleum, fluorspar, lead, and zinc. In lieu of specific action on each of these the committee adopted an amendment which specifies that the Director of the Office of Defense Mobilization shall report to the President when he has reason to believe that imports of a commodity are entering the United States in such quantities as to threaten to impair the national security; that the President shall cause an immediate investigation to be made if he feels there is reason for such belief; and that the President, if he finds a threat to the national security exists, shall take *whatever action is necessary* to adjust imports to a level that will not threaten to impair the national security.
>
> The committee believes that this amendment will provide a means for assistance to the various national defense industries which would have been affected by the individual amendments presented.

The Byrd-Millikin Amendment was thus a compromise. Rather than adopting separate amendments concerning each of the critical raw materials for which

special protection was sought in the form of quotas or increased tariffs (see p. 33, *supra*), the committee proposed an amendment that would give the President broad, flexible authority to take any appropriate action, through import quotas or otherwise, to ensure that industries critical to the national security are sufficiently protected.

Moreover, the broad language of the Byrd-Millikin Amendment ("such action as he deems necessary to adjust the imports") was nearly identical to that of the Neely Amendment ("such action as is necessary to restrict imports"). If the latter was indended, as Senator Martin stated (see p. 34, *supra*), to authorize the use of monetary exactions as well as quotas, it is fair to infer that the Byrd-Millikin substitute was also so intended. Similarly, the phrase used by the committee in its report ("whatever action is necessary to adjust imports") must be understood to comprehend all the varieties of import restrictions—including increased duties—that had been proposed with respect to various articles and that were already part of the President's arsenal under the escape clause provision (see pp. 29–30 and n. 19, *supra*).

b. The floor debate in the Senate fortifies that inference. Senator Millikin, explaining, in response to questions, the amendment that he and Senator Byrd were responsible for drafting, stated unequivocally that the amendment authorized the President to "use tariffs, quotas, import taxes, or other methods of import restriction"—in short, to take "whatever action he deems necessary to adjust imports" (101 Cong.

Rec. 5299).[26] Senator Barkley, a member of the Senate Committee on Finance, stated that the provision would permit the President to "impose such quotas *or take such other steps* as he may believe to be desirable in order to maintain the national security" (*id.* at 5298; emphasis added). And Senator Bennett, like Senator Millikin, believed that the bill would authorize use of "the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry" (*id.* at 5588).[27] We have found nothing in the debate to contradict these representations.

The court of appeals thought that the following exchange between Senators Saltonstall and Byrd demon-

[26] The court of appeals failed to give due weight to Senator Millikin's remarks. That the Senator was a "representative of Colorado which was a major supplier of coal and petroleum" (Pet. App. 17a) does not "blur [the] probative value" (*ibid.*) of his statement as an important guide to legislative intent. It is not uncommon that a bill's author represents a state with a special interest in the legislation. While that special interest may explain the legislator's role in drafting the legislation, it does not diminish the relevance of his understanding of the bill's provisions. Indeed, Senator Millikin invoked his State's strong interest in import protections to support his assurances that the amendment would accomplish its objective (101 Cong. Rec. 5299).

[27] There is no foundation for the court of appeals' statement that Senator Bennett's remark "clearly was made in reference to the entire bill and other existing laws" (Pet. App. 17a). As the context of the remark plainly indicates, Senator Bennett was addressing himself to the ways in which Section 7 of the bill—the Byrd-Millikin Amendment—would change existing law. He anticipated that, with all the tools that the provision would make available to the President for protecting essential industries, hundreds of industries would seek recognition as essential to the national security (101 Cong. Rec. 5588).

strated that "the intended scope of the [President's] action was limited to direct controls" (Pet. App. 16a). In fact, it persuasively demonstrates the converse proposition.

> Mr. SALTONSTALL. This is the final question I should like to address to the Senator. The problem of oil imports is taken care of in the last section of the bill. This gives the opportunity to the President to adjust imports, under restrictive conditions or quotas, after a report by the Director of Defense Mobilization, and after a separate, independent investigation by the President, if he believes the national security is being affected.
>
> Mr. BYRD. That is correct, except the amendment applies to all commodities; it applies not only to oil, but to all commodities.
>
> Mr. SALTONSTALL. It applies to all commodities does it?
>
> Mr. BYRD. Yes. In other words, *it puts other commodities on the same basis as agricultural commodities.* It simply leaves to the President the power, in his discretion, to decide whether *to impose a quota or to reduce the imports.* [101 Cong. Rec. 5297; emphasis added.]

The colloquy followed an exchange between Senators Byrd and Thye concerning the President's authority under Section 22 of the Agricultural Adjustment Act to impose import restrictions on agricultural products (101 Cong. Rec. 5296). That Section provided then, as it does today, that if the President finds, after an investigation by the Tariff Commission, that articles are being imported "under such conditions and in such quantities" (7 U.S.C. 624(a)) as to

interfere with certain agricultural programs or reduce substantially the domestic production of certain agricultural commodities, "he shall by proclamation impose such fees * * * or such quantitative limitations * * * as he finds * * * necessary" to protect the affected program or commodity (7 U.S.C. 624(b)). Senator Byrd's statement that the national security provision in the Trade Agreements Extension Act "puts other commodities on the same basis as agricultural commodities" (101 Cong. Rec. 5297) thus clearly indicates that it was designed to give the President similar flexibility in determining the appropriate means of adjusting the imports of an article and that the available means included monetary exactions as well as quantitative restrictions.

Senator Byrd's further statement—that the provision "leaves to the President the power, in his discretion, to decide whether to impose a quota or to reduce imports" (*ibid.*)—reinforces the implications of the other statement. The use of the disjunctive—"to impose a quota *or* to reduce the imports"—"suggests that [Senator Byrd] did not consider the quota power to be the only power that was being delegated." Note, 89 Harv. L. Rev. 432, 435, n. 31 (1975).[28]

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[28] Senator Humphrey described the national security provision as authorizing the President "to place import quotas on any articles that threaten to impair the national security" (101 Cong. Rec. 5572). That he did not view quotas as the exclusive means of adjusting imports is indicated by his remark a few moments later that the President's authority must be used with an appreciation of the potential danger of retaliatory actions on the part of our trading partners. Export industries, he stated, "can be hurt as much by increasing tariffs and a lessening of world trade as others might be by lowering of tariffs" (*ibid.*).

The bill was passed by the Senate without amendment to the National security provision (101 Cong. Rec. 5655).

c. The House conferees accepted the Byrd-Millikin national security provision with a minor amendment. H.R. Conf. Rep. No. 745, 84th Cong., 1st Sess. 2, 6–7 (1955.)

During House debate on the conference report, Congressman Cooper (chairman of the House Ways and Means Committee, member of the conference committee, and floor manager of the bill) explained the provisions of the Byrd-Millikin Amendment. He stated that the President would be expected to "consider the impact of any decision [to adjust the imports of an article] on our overall strength and security, keeping in mind that *any modification of a duty on imports or a quota* would inevitably result in a curtailment of exports by the United States" (101 Cong. Rec. 8161; emphasis added). That statement plainly reflects an understanding that the President would not be limited to quantitative import restrictions.

Congressman Cooper presented as part of his remarks a letter from Gerald D. Morgan, Special Counsel to the President, setting forth the administration's position on the Senate amendments to the bill (*id.* at 8161–8162). The letter stated that, under the Byrd-Millikin amendment, the President's action to adjust imports "could take any form that was appropriate to the situation" (*id.* at 8162). The substance of the Morgan letter was also presented to the Senate by

Senator Byrd during debate on the conference report (*id.* at 8243).[29]

The bill, including the Byrd-Millikin Amendment, was enacted into law.[30]

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[29] The conference report stated the understanding of the conferees that the national security provision "is not intended to, and does not, diminish or impair any authority the President may have under other law" (H.R. Conf. Rep. No. 745, *supra*, at 6). Respondents argued below—"plausibly," in the court of appeals' view (Pet. App. 18a)—that for the "conference statement to have content, section 1862(b) cannot grant the expansive authority that [the] Government claims" (*ibid.*). As the conference report itself makes clear, however, the statement was intended only to emphasize that the President would retain his authority, even in the absence of a threat to the national security, "to stockpile critical materials under any other law" (H.R. Conf. Rep. No. 745, *supra*, at 6). Congressman Cooper's similar explanation of the language relied on by respondents (101 Cong. Rec. 8160), and his representation that "[t]he President will enjoy full and unimpaired power in the administration of [the Byrd-Millikin] amendment" (*id.* at 8161), demonstrates, contrary to the court of appeals' view, that respondents' argument is implausible. See Note, *supra*, 89 Harv. L. Rev. at 435–436, n. 31.

[30] As enacted, the national security provision stated (69 Stat. 166):

"In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security."

3. *The Trade Agreements Extension Act of 1958.*

After the national security provision was enacted, but before it was reenacted as part of the Trade Agreements Extension Act of 1958, the Office of Defense Mobilization submitted a report to the Subcommittee on Foreign Trade Policy of the House Ways and Means Committee. The report stated that, while the provision "does not prescribe the specific actions which the President would be authorized to take, congressional discussion of the legislation indicated that the imposition of new or increased tariff duties on imports *and* the establishment of import quotas were authorized by the language adopted."[31] Another statement by that Office, submitted during hearings before the subcommittee, reiterated that, under the existing law, "only the President is authorized to determine that there is a threat [to the national security] and what means should be employed to meet it."[32]

Congressman Mills, then chairman of the subcommittee, stated on the floor of the House that "[t]he committee looked very carefully into the national security provisions of existing law" (104 Cong. Rec. 10542). The committee recommended, and Congress enacted, certain procedural amendments to those pro-

[31] Foreign Trade Policy, Compendium of Papers on United States Foreign Trade Policy Collected by the Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means, p. 643 (1958) (emphasis added).

[32] Hearings on Foreign Trade Policy before the Subcommittee on Foreign Trade Policy of the House Committee on Ways and Means, 85th Cong., 1st Sess. 399 (1957).

visions (see 72 Stat. 678–679)."[33] Although aware of the Office of Defense Mobilization's view that the existing law authorized the imposition of different types of controls to adjust imports, including tariffs as well as quotas, the committee did not recommend, and Congress did not enact, any change in what Congressman Mills referred to as "the broad delegation of authority" (104 Cong. Rec. 10542) to the President to select the means of accomplishing the necessary adjustment.

The committee's report instead reiterated that the purpose of the national security provision was "to provide those best able to judge national security needs [with] * * * a way of taking *whatever action is needed* to avoid a threat to the national security through imports." H. R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958) (emphasis added). Similarly, the report of the Senate Committee on Finance stated that "the amendments are designed to give the President unquestioned authority to limit imports which threaten to impair defense-essential industries." S. Rep. No. 1838, 85th Cong., 2d Sess. 5–6 (1958).[34]

[33] The amendments simplified the procedure for the investigation to be conducted by the Director of the Office of Defense Mobilization, and specified some of the considerations that should be taken into account by the Director of that Office and by the President in determining whether imports of an article are threatening to impair the national security. See 104 Cong. Rec. 10542–10543 (remarks of Rep. Mills).

[34] As reenacted in 1958, the national security provision provided in relevant part that, "unless the President [after receiving advice that imports of an article threaten to impair the national security] determines that the article is not being imported into

4. *The Trade Expansion Act of 1962.*

During hearings on the Trade Expansion Act of 1962, at least one member of the House Committee on Ways and Means stated his understanding that the President's authority to adjust imports under the national security provision included the power not only to impose quotas but also "to use the tariff mechanism in order to bring about a restriction in quantities of materials that might threaten to impair the national security." Hearings on Foreign Commerce: Trade Expansion Act of 1962 before the House Committee on Ways and Means, 87th Cong., 2d Sess. 767 (1962). We are not aware of anything to the contrary in the hearings.

The committee recommended reenacting "the existing provision under which the President shall take action to adjust the imports of a given article (or its derivatives) when he finds such imports threaten to impair the national security * * *." H. R. Rep. No. 1818, 87th Cong., 2d Sess. 17, 41 (1962). The provision was ultimately reenacted without substantive change as Section 232(b) of the 1962 Act (76 Stat. 877).

The court of appeals thought it was significant that the Senate passed and the conference committee later deleted an amendment to the Act that would have

the United States in such quantities or under such circumstances as to threaten to impair the national security * * *, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security" (72 Stat. 678).

"authorize[d] the President, when he finds it in the national interest, to proclaim the increase of any existing duty to such rate as he finds necessary, to impose duties on items not otherwise subject to duty and to impose quotas or other such import restrictions as he finds necessary." S. Rep. No. 2059, 87th Cong., 2d Sess. 8 (1962).[35] The purpose of the amendment apparently was to protect American industry by giving the President authority to impose retaliatory trade barriers and to strengthen the President's bargaining position in negotiating trade agreements. See 108 Cong. Rec. 19777, 19778 (remarks of Senator Kerr); *id.* at 19875 (remarks of Senator Holland). The amendment was stricken in conference (H.R. Conf. Rep. No. 2518, 87th Cong., 2d Sess. 13 (1962)), apparently because it failed to provide substantive standards or procedural safeguards for invocation of the authority conferred. See 108 Cong. Rec. 22182 (remarks of Senator Byrd).

The court of appeals inferred from the proposal's introduction that "Congress believed that no other provision of the Act conferred that authority" and, from the amendment's eventual rejection, that Congress "did not desire to confer this authority and dis-

[35] The amendment provided (108 Cong. Rec. 19573):

"Notwithstanding any other provision of law, the President may, when he finds it in the national interest, proclaim with respect to any article imported into the United States—

"(1) the increase of any existing duty on such article to such rate as he finds necessary,

"(2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary, and

"(3) the imposition of such other import restrictions as he finds necessary."

cretion upon the President" (Pet. App. 21a). Even assuming the correctness of those inferences, neither is "devastating to the Government's position" (*ibid.*).

First, as the Senate committee report indicates (see pp. 44–45, *supra*), the proposed amendment would have authorized the use of quotas as well as duties. The court's analysis, therefore, "does not * * * lead to a distinction between tariffs and quotas as means for reducing imports." Note, *supra*, 89 Harv.L.Rev. at 436. If rejection of the amendment implies an unwillingness to confer authority upon the President, the implication is no stronger with respect to "indirect" import controls than with respect to "direct" controls.

Moreover, contrary to the court of appeals' assumption, the rejected provision would not have given the President "the same authority he claims derives implicitly from [Section 232(b)]" (Pet. App. 20a). Unlike the rejected proposal, which would indeed have been an expansive delegation of authority to the President to impose import controls in the "national interest," Section 232 provides for an investigation, consultation, and recommendation to the President, requires a finding that imports threaten to impair the "national security" (in light of the considerations set forth in Section 232(c), see note 2, *supra*), and limits any adjustment of imports under the Section to what is necessary to eliminate the threat to the national security. That Congress rejected in 1962 a far broader delegation of authority over duties and other import restrictions, because of the absence of standards and procedural safeguards (see p. 45, *supra*),

does not mean that the terms of Section 232(b) should be read to exclude the President's use of license fees as a method of adjusting imports.

5. *The unsuccessful 1970 amendment.*

In 1970, the President's Cabinet Task Force on Oil Import Control advised the President that Section 232(b) gave him authority to increase tariffs and recommended that import quotas on oil be replaced with a system of tariff restrictions. *The Oil Import Question,* pp. 90, 131 (1970). The House thereafter passed an amendment to Section 232, designed to prohibit "any adjustment of imports * * * by the imposition or increase of any duty or of any fee or charge having the effect of a duty." H.R. Rep. No. 91–1435, 91st Cong., 2d Sess. 119 (1970). The amendment was reported out of the Senate Committee on Finance as part of the Social Security Amendments Act of 1970 (S. Rep. No. 91–1431, 91st Cong., 2d Sess. 36 (1970)), but was deleted on the floor of the Senate (116 Cong. Rec. 43625, 43646) and was not enacted.

If the court of appeals' analysis of the rejected 1962 amendment were applied to the aborted 1970 amendment, one might infer that Congress believed the President *did* have authority under Section 232(b) to adjust imports by the use of monetary exactions [36] and that it determined not to rescind that authority.

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[36] The House and Senate committee reports on the proposed amendment stated that "the delegation of authority to the President to adjust imports *should be* limited to the use of quantitative limitations." H.R. Rep. No. 91–1435, *supra*, at 23 (emphasis added); S. Rep. No. 91–1431, *supra*, at 251 (emphasis added).

6. The Trade Act of 1974.

Although President Nixon's import license fee system was initiated in April 1973 (A. 91–109), Congress, in the Trade Act of 1974, reenacted the national security provision with procedural but not substantive amendments (88 Stat. 1993). Both the Senate committee report and the conference report reaffirmed that, under the provision as amended, the President may "take such action, and for such time, as he deems necessary, to adjust imports so as to prevent impairment of the national security." S. Rep. No. 93–1298, 93d Cong., 2d Sess. 96–97 (1974); H.R. Conf. Rep. No. 93–1644, 93d Cong., 2d Sess. 29 (1974).

In view of the unsuccessful 1970 amendment and the President's subsequent assertion of authority to impose license fees on oil imports under Section 232(b), Congress's reenactment of the provision without material change can only be viewed as an acquiescence in the President's interpretation of the statutory language. See *Saxbe* v. *Bustos*, 419 U.S. 65, 74; *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 241; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U.S. 269, 273.[37]

[37] In May 1974, the House Committee on Ways and Means reported favorably a bill (H.R. 14462, 93d Cong., 2d Sess.) that would have amended Section 232(b) in light of the oil import license fee system established in 1973 by President Nixon. The amendment would have acknowledged the President's authority under the existing provision to adjust imports by use of quantitative limitations, duties, taxes, or fees, but would have placed conditions and restrictions on the exercise of that authority with respect to petroleum and petroleum products. See H.R. Rep. No. 93–1028, 93d Cong., 2d Sess. 4, 11, 62–65 (1974). The bill was not voted upon by the House.

In February 1975, after President Ford imposed the supplemental fees for oil import licenses, Congress passed a bill (H.R. 1767, 94th Cong., 1st Sess.) that would have negated that action and would have suspended for 90 days the President's authority under Section 232(b) to adjust the imports of petroleum or petroleum products. The bill was vetoed by President Ford (H.R. Doc. No. 94–70, 94th Cong., 1st Sess. (1975)) and was not enacted into law. The reports of the Senate and House committees stated that the bill was not intended to affect the determination in the present litigation concerning the President's authority under Section 232(b) to adjust imports by imposing monetary exactions. S. Rep. No. 94–11, 94th Cong., 1st Sess. 7 (1975); H.R. Rep. No. 94–1, 94th Cong., 1st Sess. 15 (1975).

C. THAT OTHER STATUTES DELEGATE TO THE PRESIDENT MORE LIMITED AUTHORITY TO IMPOSE IMPORT CONTROLS DOES NOT MEAN THAT SECTION 232(b) MUST BE CONSTRUED TO AUTHORIZE ONLY THE USE OF QUANTITATIVE RESTRICTIONS

The statute and its legislative history point clearly to the conclusion that the President is authorized to use any means—quantitative or monetary—that he considers necessary to adjust the imports of an article in the interest of national security. The court of appeals, however, believed that such a construction of the statute "would be an anomalous departure" from "the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs" (Pet. App. 12a).

It is true that other statutes delegating to the President the authority to impose or alter import controls have frequently circumscribed that authority more

narrowly or more explicitly (see *id.* at 13a–14a). But that is not a reason for a judicial narrowing of Section 232(b). To the contrary, the contrast shows that Congress has known how to confine such delegations closely when it has so desired, and it underscores rather than contradicts our conclusion that Section 232(b) was intended to confer the authority exercised by Presidents Nixon and Ford. Cf. *United States* v. *Yoshida International, Inc.*, Ct. of Cust. & Pat. App., No. 75–6, decided November 6, 1975, slip op. 28–30.

That conclusion does not make Section 232(b) "an anomalous departure" (Pet. App. 12a) from the legislative pattern in the area of foreign trade and tariffs. For example, Section 351(a)(1) of the same Act, 19 U.S.C. 1981(a)(1)—the present version of the trade agreements "escape clause" provision (see pp. 29–30, *supra*)—confers on the President analogous authority. Upon a finding by the Tariff Commission that an article is being imported in such increased quantities as to threaten to injure a competitive domestic industry, "the President may proclaim such increase in, or imposition of, any duty or other import restriction on the article * * * as he determines to be necessary to prevent or remedy serious injury to such industry." Like the national security provision, the escape clause provision applies to any imported article and gives the President full authority to choose the method of accomplishing the broad statutory objective. See also 19 U.S.C. (Supp. IV) 2251–2253.

The escape clause provision, unlike the national security provision, includes specific limitations on the

level to which the President may increase a duty (19 U.S.C. 1981(b)). If any inference may properly be drawn from that difference, however, it is not that Congress declined to delegate in Section 232(b) similar authority to impose monetary controls, but rather that it preferred to delegate a more flexible authority in light of the national security objective of the statute. Cf. *Lichter v. United States*, 334 U.S. 742, 782 785; *United States* v. *Yoshida International, Inc.*, *supra*, slip op. 17–18.

Even broader authority to impose import controls was delegated to the President by Congress in Section 5(b) of the Trading With the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C. App. 5(b). That Section authorizes the President, during time of war or declared national emergency, to exercise plenary control over "property in which any foreign country or a national thereof has any interest * * *." Included among the specific powers delegated is the power to "regulate * * * importation." The United States Court of Customs and Patent Appeals recently held that the President's authority under that statute comprehends the power to impose an import duty surcharge reasonably related to the nature of the emergency declared. *United States* v. *Yoshida International, Inc., supra.*

As these three provisions illustrate, the breadth and flexibility of the authority conferred on the President by Congress correspond to the nature of the national interest at stake. When the objective is to protect

domestic industries generally from the damaging effects of international trade concessions, as in the escape clause provision, the President's authority to implement import controls is relatively more confined than it is when the objective relates to the Nation's defense in time of war or national emergency, as in the Trading With the Enemy Act.

The objective of Section 232(b) is to control imports in order to prevent national emergencies and preserve the vitality of domestic industries that would be critical to the Nation's security in a time of international hostilities. The authority conferred by the statute is neither as circumscribed as that conferred by the escape clause provision nor as broad as that delegated by the Trading With the Enemy Act. It may be invoked only after the specified procedures have led to a determination, on the basis of factors identified in the statute, that imports of an article are threatening to impair the national security. Once such a determination has been made, however, the President is free to take whatever steps he considers necessary to eliminate the threat.

Although the President's authority in those circumstances is broad, that was the congressional design. It would defeat, not further, the legislative purpose to construe the statute narrowly merely because it was written broadly.[38]

[38] Nor is there any need "to read the Act narrowly to avoid constitutional problems" (*National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342). In the area of foreign affairs and national security, where the President requires sufficient flexibility to adapt quickly to changing conditions, broad delegations of authority are both common and constitutionally permissible. See, *e.g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319–322; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109; *Lichter* v. *United States*, *supra*.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1976.

APPENDIX

PROCLAMATION 4412

MODIFYING PROCLAMATION NO. 3279, AS AMENDED, RELATING TO IMPORTS OF PETROLEUM AND PETROLEUM PRODUCTS, AND PROVIDING FOR THE LONG-TERM CONTROL OF IMPORTS OF PETROLEUM PRODUCTS THROUGH A SYSTEM OF LICENSE FEES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas, pursuant to Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), the Secretary of the Treasury investigated the effects on the national security of imports of crude oil and the principal crude oil derivatives and products, and advised me that crude oil, the principal crude oil derivatives and products, and related products derived from natural gas and coal tar, were being imported in such quantities and under such circumstances as to threaten to impair the national security, and recommended that I take action to reduce such imports; and

Whereas, having considered the matters required by me to be considered by the said Trade Expansion Act of 1962, as amended, I issued Proclamation No. 4341 to adjust such imports by accelerating the base fees and imposing a supplemental fee; and

Whereas, Congress has passed, and I have approved, legislation which establishes programs to

reduce the vulnerability of the United States to interruptions in the importation of petroleum; and

Whereas, such legislation also provides for a system of price controls which will allow gradual increases in the cost of domestic petroleum to levels substantially above those which prevail at present and should, in the long term, promote petroleum conservation and tend to discourage the importation into the United States of petroleum and petroleum products; and

Whereas, I have thus determined that the purposes of the supplemental fee will be served by such legislation, and that it is consistent with the national security to eliminate the supplemental fee effective December 22, 1975; and

Whereas, in order to offset the relative advantages of locating refining capacity abroad, and to carry out the other long term objectives of the import program established pursuant to Proclamation No. 4210 of April 18, 1973, I have determined to retain the base fees at this time; and

Whereas, certain modifications to the Mandatory Oil Import Program are necessary to facilitate the availability of crude oil supplies to United States users through exchanges of Canadian and United States crude oil, and for other purposes;

Now, therefore, I, Gerald R. Ford, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution and the laws of the United States, including Section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim that, effective as of December 22, 1975, Proclamation No. 3279, as amended, is hereby amended as follows:

Section 1. The last sentence of paragraph (c) of Section 1 is deleted.

Sec. 2. Subparagraph (1) of paragraph (a) of Section 3 is amended by deleting clauses (iii) through (viii), by redesignating clauses (ix) and (x) as clauses (iv) and (v) respectively, by substituting the words "paragraph 3(a)(1)(i)—(ii)" for the words paragraph(s) 3(a)(1)(i)-(iii)" wherever they may appear, and by adding clauses (iii), (vi), and (vii) to read as follows:

"(iii) with respect to the fees imposed pursuant to paragraph 3(a)(1)(i)-(ii), the amount of such fees shall be reduced, in such manner as may be provided by the Administrator, by an amount equal to any applicable duties;

"(vi) with respect to licenses issued against a surety bond pursuant to paragraph 3(a)(1)(i)-(ii), fees shall be paid no later than the last day of the month following the month in which such imports were released from customs custody or entered or withdrawn from warehouse for consumption, whichever occurs first; and

"(vii) with respect to imports made on or before December 21, 1975, all supplemental fees payable under paragraph 3(a)(1)(iii) of this Proclamation as in effect on December 21, 1975, shall be payable in accordance with this Proclamation as in effect on that date.".

Sec. 3. Subparagraph (3) of paragraph (a) of Section 3 is amended to read as follows:

"(3) The Administrator is authorized to refund or reduce fees, whether in whole or in part, (i) where the licensee failed to use, wholly or in part, the license issued to him, (ii) where refunds or reductions, whether in whole or in part, are ordered pursuant to Section 5, (iii) where refunds or reductions, whether

in whole or in part, are called for by reason of a person having exported finished products or petrochemicals, (iv) where crude oil imported by virtue of a license for which a fee was paid has been manufactured into asphalt, (v) for payment to the importer of record of sums refunded pursuant to clauses (iii), (iv), (v) and (vii) of paragraph 3(a)(1), as amended by this Proclamation, (vi) where the importer of record participates in an exchange in accordance with the next to last sentence of paragraph 4(b)(1), (vii) where refund of a licensee fee is called for by reason of the same having been improperly charged.".

Sec. 4. Subparagraph (2) of paragraph (c) of Section 3 is deleted. Subparagraph (3) of paragraph (c) of Section 3 is redesignated as paragraph (2).

Sec. 5. Subparagraph (1) of paragraph (b) of Section 4 is amended by inserting the following sentence immediately before the last sentence:

"Notwithstanding the levels established in Section 2 of this Proclamation, the Administrator may make allocations to which license fees under paragraph 3(a)(1)(i)–(ii) shall not be applicable, with respect to crude oil or unfinished oils imported from Canada in exchange for crude oil, unfinished oils, or finished products produced in the United States or entered into United States customs territory and exported to Canada.".

Sec. 6. Paragraph "n" of Section 11 is deleted.

In witness whereof, I have hereunto set my hand this third day of January in the year of our Lord nineteen hundred seventy-six and of the Independence of the United States of America the two hundredth.

GERALD R. FORD.

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No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for the Respondents

Statement of the Case

1. Petitioners seek reversal of a decision of the United States Court of Appeals for the District of Columbia Circuit which invalidated a program of license fees imposed on imported petroleum and petroleum products. Respondents[1]

[1] Respondents fall into two groups. One group is comprised of nine states and the Governors of eight of those nine states. This group of respondents filed civil action No. 75-1281 in district court and a petition for review of FEA regulations (No. 75-1206) in the court of appeals. The second group consists of ten utility companies and an individual who is a Massachusetts consumer and Congressman. This group filed civil action No. 75-1282 in the district court and petition for review No. 75-1202 in the court of appeals. The two groups are separately represented, but this brief is a joint submission prepared on behalf of all respondents.

commenced four separate suits challenging the two-tier license fee system, all of which are consolidated in the court of appeals. The challenged license fees are imposed by the oil import regulations of the Federal Energy Administration (FEA) (10 C.F. R. 213) under the asserted authority of Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1862(b). That section authorizes the President to:

> take such action and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives so that . . . imports [of such article] will not . . . threaten to impair the national security.

The court of appeals found that in this section "Congress only delegated authority to adjust imports to protect national security through direct mechanisms" (Pet. App. 27a). Since the license fee system sought to regulate imports indirectly, the court reasoned that it was beyond the scope of the authority delegated to the Executive under § 1862(b) and therefore invalid.

2. The program under which the oil import license fees are imposed originated with the establishment of the Mandatory Oil Import Program by President Eisenhower in 1959.[2] In its original form the program required each importer to secure a license to import crude oil, unfinished oil and finished products. The United States was divided into five geographical districts and quotas were imposed on imports into the several districts. The Secretary of the Interior was required to allocate these quotas among persons having either a history of imports or already existing refinery capacity. No license fees were imposed under that program. From March 10, 1959, to May 1, 1973, the quota system imposed by the Mandatory Oil

[2] Pres. Proc. 3279, 24 Fed. Reg. 1781.

Import Program, as subsequently amended, remained in force without interruption.

3. In 1973 the quota system was abandoned in favor of a license fee system. President Nixon issued Presidential Proclamation 4210[3] in April of that year. This Proclamation retained the licensing aspect of the program but conditioned issuance of licenses upon the payment of a fee. It established a gradually increasing schedule of fees which were to escalate by the end of 1975 to $0.21 per barrel for crude oil and $0.63 per barrel for most petroleum products.[4]

The initial impact of these "first-tier" fees was cushioned by a provision in the Proclamation reserving certain amounts of imports for distribution to the several districts which might be made without payment of fees. Proc. 4210, § 2(a). The oil import regulations promulgated pursuant to the Proclamation accordingly provided for the issuance of fee-free licenses based primarily on import or refinery histories. These fee-free licenses were to be gradually phased out over a seven-year period; by 1980 all importers would be required to pay the full license fee amount. Significantly, Proclamation 4210 abolished the existing tariff on petroleum products,[5] and replaced it with the fee systems.

4. On January 3, 1975, the Trade Act of 1974 (P.L. 93-618) became effective. It worked several changes in § 1862(b),

[3] 38 Fed. Reg. 9645.

[4] At the outset of this "first-tier" system, license fees were set at substantially lower levels. The per barrel fee for crude oil, for example, was set at $0.105 and for finished products and unfinished oils at $0.15.

[5] The court of appeals held that § 1862(b) does not authorize a President to suspend duly enacted tariffs, but stated that relief from President Nixon's action was inappropriate since President Ford ultimately reinstated the tariffs (Pet. App. 28a., n. 18).

one of which was to transfer the responsibility to conduct an appropriate investigation under that section to the Secretary of the Treasury. The following day Secretary Simon delegated his authority to Assistant Secretary David R. MacDonald, directed him to conduct such an investigation and informed him that it would be unnecessary to hold public hearings or otherwise afford interested parties an opportunity to be heard (A. 154).

Assistant Secretary MacDonald then conducted a ten-day investigation, in the course of which he solicited and received comments from a number of federal agencies.[6] On January 13, 1975, he submitted a report of his investigation to Secretary Simon (A. 134). That report concluded with a statement of MacDonald's understanding "that a Presidential Proclamation pursuant to Section 232 of the Trade Expansion Act of 1962 is being drafted by the Federal Energy Administration consistent with these recommendations" (A. 152, 153). Secretary Simon's report to the President was transmitted on the following day, and it too concluded with a statement to the effect that a Presidential Proclamation was already being prepared (A. 133).[7]

Secretary Simon found that the national security was threatened by the level of oil imports and recommended to

[6] Secretary of State Kissinger was apparently consulted on January 3, before Mr. MacDonald had been assigned the task of conducting a § 1862(b) investigation (A. 155). Deputy Under Secretary of Labor, Joel Segall, indicated that the Department of Labor could not provide the requested information within the time allotted (A. 168).

[7] Respondents have consistently argued that no true investigation was conducted pursuant to § 1862(b), citing the precipitous nature of the inquiry and arguing that the outcome of the inquiry was predetermined. The court of appeals found it unnecessary to reach the issue posed by this contention (Pet. App. 10a, n. 11, 28a).

the President that "appropriate action be taken to reduce imports" (A. 132).[8]

5. On January 23, 1975, President Ford issued Proclamation 4341 based on the investigation and recommendation of Secretary Simon. It dramatically increased the amount of fees imposed under the oil import program by increasing the existing first-tier fees to their maximum levels, and by imposing a "second tier" of supplemental fees on all imported oil. The supplemental fees were originally to be phased in during February, March and April of 1975. The second-tier fees would have amounted to one dollar per barrel for oil entering the United States on or after February 1, 1975, and would have risen in one dollar monthly increments to a permanent level of three dollars per barrel for oil entering on or after April 1, 1975.[9] In addition, President Ford reinstated the tariffs which his predecessor had eliminated.

The fees contemplated by Proclamation 4341 were massive. The White House itself estimated that the second-tier fees alone would generate monthly revenues of $400 million, or $4.8 billion annually (A. 269).

[8] The court of appeals did not treat respondents' argument that the Secretary's statement was not a recommendation within the meaning of the statute (Pet. App. 28a).

[9] Proclamation 4341 authorized the Administrator of the FEA to reduce fees on unfinished oil products to zero in February, $0.60 per barrel in March and $1.20 per barrel in April. On January 31, 1975, the Administrator took action to reduce fees to those levels. 40 Fed. Reg. 4771.

Subsequent Presidential action resulted in the deferral of increases in the supplemental fee schedules. In spite of the claimed emergency nature of the original action which obviated public hearing, the two-dollar fee was not made effective until June 1, 1975, and the three-dollar fee was never imposed. *See* Exec. Proc. 4355, 40 Fed. Reg. 10437, A. 121-124; Exec. Proc. 4370, 40 Fed. Reg. 19421, A. 125-126; Exec. Proc. 4377, 40 Fed. Reg. 23429, A. 127-130.

6. Within four days of the issuance of Proclamation 4341, respondents brought actions in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the petitioners. Respondents contended that the imposition of license fees pursuant to § 1862(b) exceeded the delegation of authority contained in that section and that the fees were invalidly adopted without compliance with procedural safeguards imposed by § 1862(b) and the National Environmental Policy Act, 42 U.S.C. 4321 *et seq*.

In denying preliminary relief to the respondents and adopting findings in respect thereto as a final judgment,[10] the court found that although the respondents were irreparably injured by the license fee program, they had made no showing of a likelihood of success on the merits. The court held that the license fee program was one of a number of possible actions covered in the non-defined phrase "to adjust imports" (Pet. App. 42a). The court rejected the argument that the license fees are "taxes" and accordingly held that the action was not barred by the Anti-Injunction Act, 26 U.S.C. 7421(a), and that jurisdiction was properly predicated on 28 U.S.C. 1331 and 1340 (Pet. App. 42a). Finally, the district court found that the procedural prerequisites to a valid exercise of the power conferred by § 1862(b) had been satisfied (Pet. App. 47a). Respondents appealed this final decision to the United States Court of Appeals for the District of Columbia Circuit.

7. Respondents' appeals were formally consolidated in the court of appeals with their petition for review of the FEA's

[10] The respondents' requests for preliminary injunctive relief were denied on February 21, 1975. On March 7, 1975, the respondents filed a motion to consolidate the hearing on the merits with the hearing on the preliminary injunction. That motion was allowed on March 11, 1975, at which time the court adopted its earlier Findings of Fact and Conclusions of Law as a final judgment (A. 3, 4).

implementing regulations.[11] The court of appeals reversed the judgment of the district court, remanded the case to the district court, and set aside the FEA's regulations. The decision of that court is fully reproduced in the Petition for a Writ of Certiorari (Pet App. 1a-38a). The court did not reach the procedural arguments raised by the respondents. Instead, it based its decision on the nature of the power delegated to the Executive in § 1862(b). The court found that § 1862(b) authorized only the imposition of direct mechanisms to adjust imports (Pet. App. 42a), and that indirect pricing mechanisms were not among the regulatory measures the President could adopt.

8. Subsequent to its decision on the merits, the court of appeals stayed the issuance of its mandate to permit the filing of a petition for a writ of certiorari (A. 400). The respondents opposed the stay and repeatedly sought a modification of the order in order to preserve their claim to monies paid to the Administrator for license fees (A. 7-9, 12-14). Although the court denied the relief sought by the respondents, it did so on the representation of petitioners that the rights of all parties would be protected during the pendency of these proceedings.[12]

[11] The per curiam order consolidating the cases was entered on April 18, 1975. At that time the increase in supplemental fees to two and three dollars had been deferred pursuant to Proc. 4355 (40 Fed. Reg. 10437) and respondents' request for advancement of hearing was denied without prejudice (A. 6). The two-dollar supplemental fee took effect on June 1, 1975, and on June 6 respondents' subsequent motion for advancement was allowed (A. 7).

[12] Payments of license fees were deferred and preliminary injunctions requiring the defendants to deposit the fees collected were entered in two cases brought as a result of this litigation. *See* Notice of Further Deferral of Supplemental Fee Payments Originally Due August 31, 1975, at A. 380; *Amoco Oil Corp., et al.* v. *Zarb, et al.* (D.D.C., C.A. 75-1529); *Coastal States Gas Corp., et al.* v. *Federal Energy Administration, et al.* (S.D. Tex., C.A. 75-H-1668). In those cases preliminary injunctions were issued requiring petitioners to deposit license fees collected in a special interest-bearing Treasury account so that the fees will ultimately be available for refund.

9. Petitioners sought review by writ of certiorari, claiming that the decision of the court of appeals "impairs the President's capacity to take effective action . . . to extricate this country from its increasingly dangerous dependence on foreign petroleum" (Pet. App. 12). Respondents opposed issuance of a writ of certiorari, arguing, *inter alia*, that the announced intentions of the Executive to abandon the supplemental fee program rendered this case "episodic" within the meaning of *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). On January 3, 1976, the eventuality envisioned by respondents' Brief in Opposition came to pass. On that day, President Ford issued Proclamation 4412 (41 Fed. Reg. 1037), which amended the license fee program in light of the provisions of the Energy Policy and Conservation Act of 1975, P.L. 94-163. It eliminated the supplemental fee system upon a declaration that the purpose of the system would be served by the new statute; American dependence on foreign oil would be decreased by the provisions of the new Act.[13]

This Court granted certiorari on November 3, 1975.

[13] The issuance of Proclamation 4412 and attendant changes in the oil import program do not moot this case. The first-tier fees were left intact by that Proclamation. Those fees were challenged by the utility companies in the district court (A. 62-63, 69-70) and by both groups of respondents in their petitions for review (A. 348-349, 352-353). Respondents also claim a direct interest in the monies already collected and held in the special Treasury account.

While the action of the President does not render this case moot, respondents do suggest that the special reasons for granting certiorari no longer exist and that the writ should be dismissed as improvidently granted.

Summary of Argument

The President's imposition of license fees on imported oil was beyond the scope of authority delegated to him by 19 U.S.C. 1862(b). Well-established principles of statutory construction, legislative history, and the dire implications of the broad and unprecedented powers asserted by the President all establish that § 1862(b) authorizes adjustment of imports through use of direct mechanisms such as quotas, but not through indirect mechanisms such as license fees.

I.

The Anti-Injunction Act, 26 U.S.C. 7421(a), does not apply to this case. Respondents agree with the Solicitor General's conclusion that, in precluding suits brought "for the purpose of restraining the assessment or collection of any tax," Congress directed § 7421(a) exclusively at taxes imposed under the Internal Revenue Codes of 1939 and 1954. The Act is therefore inapplicable to a challenge arising under 19 U.S.C. 1862(b), which is part of the trade laws rather than the Internal Revenue Code. Respondents further argue, on a narrower ground, that the Anti-Injunction Act does not apply to the two cases that originated as petitions for review of FEA regulations. The specific statutory review provision in the Federal Energy Administration Act, 15 U.S.C. 766(i)(2)(A), contains a grant of jurisdiction that insulates the petition from dismissal under the Anti-Injunction Act. Finally, respondents argue that the Anti-Injunction Act does not apply to license fees imposed by Executive action. These fees, by the Presi-

dent's own designation, purport to be non-tax mechanisms, and this Court has consistently read § 7421(a) to permit suits to enjoin monetary exactions other than taxes.

II.

A. Turning to the substance of the appeal, respondents first describe the limitless nature of the authority claimed by the President under § 1862(b). Analyzing the statutory phrase "adjust the imports" under which the President has acted, respondents show that its scope logically includes only direct methods of adjustment such as quotas. Reference to other parts of Title 19 of the United States Code as well as other federal statutes indicates that the phrase denotes a direct and certain method for controlling imports. Indirect measures such as license fees have a speculative impact on imports and are therefore inconsistent with a sensible reading of § 1862(b).

Respondents next apply fundamental principles of statutory construction in support of their argument. First, delegations of the taxing power are disfavored without a clear and explicit statement from Congress. Because § 1862(b) nowhere mentions or implies the power to tax, the "clear statement" principle is fatal to petitioners' claim. This conclusion is buttressed by the fact that Congress, in passing and continually amending the Trade Acts, has made plain its intent to limit the extent of tariff power delegated to the President. Since the President's license fees were projected to collect more money in one year than all tariff provisions in Title 19 combined, these fees constitute a circumvention of the tightly limited tariff provisions and are inconsistent with Congressional intent. Respondents submit, as a final principle, that § 1862(b) must be interpreted narrowly to exclude license fee authorization in order to avoid serious constitutional questions. Under the boundless

reading offered by petitioners it could be argued, for example, that § 1862(b) represents an unconstitutionally broad delegation of legislative power.

B. The final sections of respondents' brief present the full framework of legislative history underlying the original enactment of § 1862(b) as well as subsequently proposed amendments. The consistent theme in this history is that Congress intended to give the President only the power to impose direct restrictions upon imports. Viewed in this context the isolated legislative statements cited by petitioners shrink to minor importance. In light of the long term philosophical tug of war between the Free Trade advocates and Protectionists in Congress, it is unrealistic to assume that Congress would knowingly enact or even consider including authority to impose fees or duties in § 1862(b) without fierce debate. Moreover, a review of the Committee Reports and the Floor Debates on the original version of § 1862(b) in 1955 reveals that Congress had in mind only direct measures such as quotas or voluntary import restraints as the means to adjust imports.

The subsequent rejection in 1962 of an amendment that would have added to § 1862(b) a power to impose duties further weakens petitioners' argument. Finally, when the Congress in 1970 once again considered amending § 1862(b), the Committee Reports and Floor Debates reiterate that adjustment of imports by quota, not duties, was contemplated in 1955. This history compels a conclusion that the imposition of the massive license fees by the President is beyond the scope of § 1862(b).

Argument

I.

Jurisdiction Is Not Barred By The Anti-Injunction Act.

A. *The Anti-Injunction Act Applies Only To Taxes Imposed Under The Internal Revenue Codes Of 1939 And 1954.*

In its order granting the petition for a writ of certiorari in this case, the Court directed the parties "to brief and argue the applicability of the Anti-Injunction Act, 26 U.S.C. § 7421(a)" (A. 402). The petitioners did not raise this issue before the court of appeals nor in their petition for certiorari. In their brief on the merits, petitioners have conceded that these actions are not barred by the Anti-Injunction Act. The basis for their concession is the conclusion that § 7421(a) is applicable only with respect to taxes imposed under the Internal Revenue Codes of 1939 and 1954, and is therefore inapplicable to 19 U.S.C. 1862(b) (Pet. Br. 21).

The respondents agree that the Anti-Injunction Act is not a bar to the present actions. As one ground for this conclusion, respondents adopt petitioners' argument that the Act is limited to taxes imposed under the 1939 and 1954 Internal Revenue Codes. Respondents further brief this issue because the Act is jurisdictional in nature, and it is axiomatic that the parties to an action may not by agreement confer jurisdiction on a federal court. *Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165 (1939). Moreover, this Court has narrower, alternative grounds on which it may base a decision that § 7421(a) is inapplicable.

B. *The Anti-Injunction Act Is Not A Bar To A Petition For Review Of Regulations Promulgated By The Federal Energy Administration.*

In their treatment of the Anti-Injunction Act, the petitioners assert that it applies equally to suits brought in the district court to enjoin the collection of a tax and to actions brought in the court of appeals to set aside administrative regulations (Pet. Br. 19). Respondents disagree. The Act does not apply to a petition for review of FEA regulations.

The petition filed in the court of appeals sought review of regulations issued by the FEA pursuant to authority conferred by Executive Order[14] and by § 5 of the Federal Energy Administration Act of 1974, 15 U.S.C. 761 *et seq.* (hereafter FEAA). Jurisdiction for such judicial review is expressly conferred by § 7(i)(2)(A) of the FEAA, 15 U.S.C. 766(i)(2)(A), which provides:

> Judicial review of administrative rulemaking of general and national applicability done under this chapter . . . may be obtained only by filing a petition for review in the United States Court of Appeals for the District of Columbia within thirty days from the date of promulgation of any such rule, regulation or order. . . .

To construe the Anti-Injunction Act in such a manner as to bar the maintenance of these petitions would be to place a

[14] The Federal program for the regulation of oil imports was created in 1959 as a licensing and allocation program by Proc. 3279 (Mar. 10, 1959, 24 Fed. Reg. 1781). The current program for the regulation of oil imports remains essentially a licensing program governed by Proc. 3279, as amended. Proc. 3279 committed to the Secretary of the Interior rulemaking authority for the establishment and administration of the program. These functions of the Secretary of the Interior were transferred in 1974 to the FEA by § 6 of the FEAA.

Procs. 4210 and 4341 alone created inchoate fees. Only the regulations of the Secretary of the Interior and the FEA brought the system into operation by providing a mechanism of collection and the exact terms of the fee itself. The FEA was also given broad authority to vary the fee from time to time. Proc. 4341, A. 113; Proc. 4355, A. 122; Proc. 4370, A. 126; Proc. 4377, A. 128.

restriction upon judicial review wholly inconsistent with the language of the Act and its legislative history, both of which indicate that Congress intended to subject all actions of the Administrator to review.[15]

The manifest purpose of the FEAA was to reorganize and consolidate certain energy related functions of the federal government in a single new agency. When it enacted the FEAA, Congress had before it the entire range of pre-existing energy related agencies and the statutes creating those agencies.[16] It could have adopted as a model for judicial review the provisions of any one of those statutes. The selection of the liberal provisions for review embodied in the FEAA is significant in light of the more stringent provisions considered and rejected prior to enactment.

The review provisions of the Senate version of the bill (S. 2776) were modeled on those of the Economic Stabilization Act Amendments of 1971.[17] The Ninety-Third Congress had

[15] *See* H.R. Rep. No. 93-748 at 1974 U.S. Cong. & Adm. News 2939. *See also* Minority Views of Hon. John E. Moss and Hon. Bella S. Abzug, *id.* at 2968.

[16] *E.g.*, the Economic Stabilization Act of 1970 (P.L. 91-379) as amended by the Economic Stabilization Act Amendments of 1971 (P.L. 92-210); the Emergency Petroleum Allocation Act of 1973 (P.L. 93-159); and the Energy Emergency Act of 1975 (H.R. 11450, S. 2589).

[17] Under the Economic Stabilization Act, as amended, a United States District Court or the Temporary Emergency Court of Appeals may enjoin the application of a particular regulation or order to a person who is a party to litigation before it. Section 211(e)(1). However, no regulation of any agency exercising authority under that Act may be set aside unless a final judgment has been issued as to the legality of the regulation. Section 211(d)(1). Furthermore, Subsection 211(f) of the Economic Stabilization Act, as amended, provides for an automatic stay of mandate from any final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of that Act or any regulation or order issued thereunder.

used those provisions as a model earlier in the session when enacting the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* When it enacted the FEAA, however, Congress expressly rejected the provisions of the Senate bill and opted instead for the House version. See H.R. Rep. No. 93-748 at 1974 U.S. Cong. & Adm. News 2939. The law as enacted does not contain the specific limitations on review which characterized earlier energy legislation. Furthermore, § 8(f) of the FEAA states that in the event of any inconsistency between the judicial review procedures otherwise applicable to functions transferred from other agencies to the FEA, and the liberal procedures in § 7, the provisions in § 7 shall govern.

In short, the jurisdictional grant in the FEAA insulates the petitions for review from an attack based on the Anti-Injunction Act. The FEAA and the Anti-Injunction Act must be read *in pari materia*:

> Where one statute deals with the subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail. . . . In the language of a court: "It is the general rule that where the general statute standing alone would include the same matter as a special act, and thus conflict with it, the special act will be considered as an exception to the general statute. . . . Where the special statute is later it will be regarded as an exception to or qualification of the prior general one. . . ." 2A Sutherland, *Statutory Construction* 315 (4th ed. 1973).

This principle of interpretation was recently applied by this Court in *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). Despite the "literal applicability" of the general language of

the Civil Rights Act of 1871, 42 U.S.C. 1983, to complaints of unconstitutional disciplinary action in state prisons, the Court found that "Congress ha[d] passed a habeas corpus statute (28 U.S.C. § 2254), which required prior exhaustion of state remedies." Here, as in *Preiser*, "[i]t would wholly frustrate explicit congressional intent" to allow the earlier and more general statute to override the explicit provisions of the later and more specific statute.[18]

The Anti-Injunction Act was not held to bar jurisdiction over petitions to set aside license fees imposed by the Federal Communications Commission and the Federal Power Commission considered by this Court last term. *National Cable Television Assn.* v. *United States*, 415 U.S. 336 (1974); *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345 (1974). In those cases, as here, jurisdiction was based upon express statutory provisions for judicial review of agency rulemaking.

C. *The Anti-Injunction Act Does Not Apply To License Fees Imposed By Executive Action.*

Section 7421(a) prohibits suits to restrain the collection or assessment of a "tax." It reads, in pertinent part:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

[18] In analogous cases, this Court has held that the specific provisions of the wartime Emergency Price Control Act of 1942 (56 Stat. 23, c. 56), granting authority for injunctive relief in the federal courts, constituted an exception to the general provision of the Judicial Code (§ 265 of the Judicial Code of 1911, 36 Stat. 1087, 1162, c. 231) forbidding federal courts from enjoining state proceedings. *Bowles* v. *Willingham*, 321 U.S. 503, 510 (1944); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

Respondents contend that there is a distinction between a license fee imposed by Executive action and a tax; § 7421(a) applies only to exactions of the latter category. Both the courts and the President have recognized that there is a difference between the two, and this Court need only maintain the already articulated distinctions in order to determine that the Anti-Injunction Act is inapplicable.

The Outline of Energy Questions and Answers which accompanied the President's 1975 State of the Union Message explicitly distinguished the oil import license fees from a tax and from a tariff.

> Q. What are the differences between a tax, a fee and a tariff?
>
> A. All three are charges which can be used to produce revenues and all three have the effect of reducing demand. The differences lie in the source of authority to levy the charge. A tax must be levied by Congress for the purpose of raising domestic revenue. A tariff is a charge against imports and must also be authorized by Congress. A fee is also levied on imported material but may be set for non-revenue purposes and need not be legislated.

This Court has indicated that a tax is "that which is in a condition to be collected as a tax and is claimed by the proper official to be a tax." *Snyder* v. *Marks*, 109 U.S. 189 (1883). It has declined to second-guess Congress on its use of the term in characterizing a monetary exaction. *McCray* v.

United States, 195 U.S. 27 (1904).[19] In the case at bar the President is the official who determined that license fees were to be imposed on imported oil. His characterization of the mechanism as a "non-tax" is controlling for purposes of the Anti-Injunction Act.

Like the President, this Court has also recently distinguished fees from taxes. In the *National Cable Television Assn.* case, *supra*, Justice Douglas wrote:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. 415 U.S. at 340.

[19] For a brief period during the 1920's, the Judiciary did attempt to distinguish between measures which were truly taxes and those that were penalties. *Lipke* v. *Lederer*, 259 U.S. 557 (1922); *Regal Drug Corp.* v. *Wardell*, 260 U.S. 386 (1922). These cases represent a short-lived anomaly. *Bob Jones University* v. *Simon*, 416 U.S. 725, 741 (1974). Traditionally, the Court has refused to go behind what is formally a revenue measure to determine whether it is in fact a tax and has accepted the Congressional designation as controlling.

See, generally, Bernard Schwartz, *A Commentary on the Constitution of the United States*, Part I, p. 59, commenting on *United States* v. *Kahriger*, 345 U.S. 22 (1953). That the Congressional designation of a measure as a tax distinguishes it from other mechanisms is underscored by the provisions of 19 U.S.C. 1528, which reads:

> No tax or other charge imposed by or pursuant to any law of the United States shall be construed to be a customs duty for the purpose of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty . . . imposed under the customs laws.

In order to determine that the Anti-Injunction Act is not a bar to these actions this Court need only maintain the distinctions already articulated by the President and the courts. The respondents did not seek to enjoin the assessment or collection of a tax by Internal Revenue officers deposited in the general funds of the Treasury. On the contrary, suit was brought to enjoin the collection of a license fee imposed by executive fiat, collected by the FEA and held in a separate suspense account. The license fees were not designated a tax by the Congress or the President and are not collected in the manner of a tax.[20] Clearly, the provisions of § 7421(a) do not deprive the federal courts of jurisdiction to hear suits to enjoin such license fees.

Neither the history nor the manifest purpose of the Anti-Injunction Act suggests that it is applicable to non-tax mechanisms. The statute originated over a century ago in Section 10 of the Revenue Act of March 2, 1867, 14 Stat. 475. It has consistently been read in a fashion permitting suits to enjoin monetary exactions other than taxes. The purpose of the act is to protect the efficient operation of tax collection against pre-enforcement judicial interference. In the words of Justice Blackmun:

> It was enacted to prevent in the federal system the type of injunctive suits that had plagued tax collections by the States. The Court has recognized the congressional concern underlying the statute, namely, that if courts were to exercise injunctive power with respect to the collection of taxes, the Government's very existence could be threat-

[20] To the extent that the Anti-Injunction Act embodies the purpose that disputed tax matters be presented for administrative remedies without interference with the collection process (*see Snyder* v. *Marks*, 109 U.S. 189 (1883); *Cheatham* v. *United States*, 92 U.S. 85 (1875)) it is useful to note the total lack of administrative machinery available to those challenging oil import license fees. The Board of Oil Import Appeals has no jurisdiction over an appeal based upon the invalidity of the license fee system. 10 C.F.R. 206.33(b).

ened. *Laing* v. *United States*, _____ U.S. _____, 44 U.S.L.W. 4035, 4045 (1976) (dissenting opinion).

The purpose of the act would not be served by extending it to encompass what the President himself labeled as "non-revenue raising"[11] license fees imposed for non-revenue raising purposes. If the Anti-Injunction Act were applied to monetary exactions created by the President, the actions of the Executive branch would gain immunity from review in instances where it had exceeded its authority under statutes which were regulatory in nature and made no mention of a taxing power.

Ordinarily, a two-step analysis is used in determining the applicability of the Anti-Injunction Act. The court asks first when the statute applies and, second, when it is applicable, under what circumstances an exception is permitted. *See Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 767 (1974). In this case it is unnecessary to consider whether or not an exception is in order because, on the first issue, the statute does not apply. The act bars actions to enjoin or restrain the collection or assessment of a "tax" but is inapplicable to petitions for review filed pursuant to the FEAA and to suits challenging license fees. Consequently, it is appropriate for this Court to proceed to the merits of the appeal.

[11] In ordering the imposition of license fees, the President purported to take an action designed to protect the national security rather than raise revenue. Presidential Proclamation 4341 read in part:

> WHEREAS, I judge it necessary and consistent with the national security to further discourage importation into the United States of petroleum, petroleum products, and related products, in such quantities or under such circumstances as to threaten to impair the national security; to create conditions favorable to domestic crude oil production needed for projected national security requirements; and to increase the capacity of domestic refineries and petro-chemical plants to meet such requirements; and to encourage the development of other sources of energy.

II.

THE PRESIDENT DOES NOT POSSESS AUTHORITY TO IMPOSE IMPORT LICENSE FEES UNDER 19 U.S.C. 1862(b).

A. *Introduction.*

Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1862(b), directs the President, if he determines after due investigation that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,

> . . . [to] take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

The court of appeals construed this statutory language as delegating to the President the limited power *directly* to adjust imports by the imposition of quotas or other quantitative limitations, rather than the expansive power to take any action which might *indirectly* adjust the level of imports, such as the imposition of tariffs, license fees or other monetary sanctions. In so holding the court of appeals focused upon (a) the Congressional tradition of narrowly and carefully circumscribing delegations of the taxing power, (b) the legislative history of the trade agreements acts, and (c) the principles of public policy and constitutional law embodied in the *National Cable Television* and *New England Power Co.* decisions[12] (Pet. App. 12a).

[12] *National Cable Television Assn.* v. *United States*, 415 U.S. 336 (1974); *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345 (1974).

In contrast, the petitioners seek to derive from § 1862(b) expansive and unprecedented executive powers over domestic and foreign commerce. The President's power under § 1862(b), they assert,

> is subject to only one limitation. The President must deem the action to be necessary to accomplish the prescribed objective. . . . The statute does not otherwise limit in any way the nature of the action that the President may take. (Pet. Br. 26.)

Such an expansive interpretation envisions § 1862(b) as a virtually complete abdication of the commerce and tariff powers by the Congress, quite properly characterized by the court of appeals as an "anomalous delegation of almost unbridled discretion and authority in the tariff area" and "a massive assertion of executive authority in an area . . . thoroughly occupied by Congress" (Pet. App. 14a). This characterization is not an exaggeration, as illustrated by the following implications of the powers claimed by the President:

1. The President's asserted power to adjust imports extends, by reason of the broad definition of "national security" contained in § 1862(c), over almost every article of commerce.[23]

[23] The court of appeals stated that "the number of articles potentially covered under the umbrella of 'national security' is great" (Pet. App. 14a). The Trading with the Enemy Act, 50 U.S.C. App. 5, which likewise gives licensing powers to the President over articles of foreign commerce, has been interpreted to cover a vast array of articles. *See generally*, Foreign Assets Control Regulations (31 C.F.R. 500.1-500.808); Transaction Control Regulations (31 C.F.R. 505.10-505.60); and the Cuban Import Regulations (31 C.F.R. 515.101-515.801).

2. The President's asserted power under § 1862(b) includes the power to impose tariffs unlimited in amount — a claim of unbridled discretion without precedent in U.S. tariff legislation — as well as the power to abolish tariffs completely. *See* Proc. 4210, § 16; Proc. 4341, § 12.

3. The President's asserted power would be essentially unreviewable by the judiciary since it involves a national security determination. *Cf. Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). *See also, Sardino* v. *Federal Reserve Bank of N.Y.*, 361 F. 2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966); *Werner* v. *United States*, 119 F. Supp. 894 (S.D. Cal. 1954), *aff'd*, 233 F. 2d 52 (9th Cir. 1956), *cert. denied*, 352 U.S. 842 (1956).[24]

When Congress authorized the President to adjust imports, it did not intend to confer the unlimited, unprecedented and unreviewable executive powers claimed by the petitioners in this case.

[24] Also, the President's asserted exercise of these broad nonreviewable powers may not be rescinded by Congress — as recent experience indicates — except by overriding a Presidential veto by two-thirds vote of both Houses of Congress. In February, 1975, Congress passed a bill (H.R. 1767) which would have imposed a 90-day moratorium on the imposition of the supplemental fees imposed by Proc. 4341. This bill was vetoed by the President. H.R. Doc. No. 94-70, 94th Cong., 2d Sess. (1975).

B. *The Authority Delegated By Congress To The President Under 19 U.S.C. 1862(b) Is Limited To Imposition Of Direct Import Controls.*

President Ford, relying on the generality of the language of § 1862(b), has asserted power to levy import license fees calculated to have a major impact on the domestic economy (A. 239 *et seq.*). The revenues predicted to be derived by the supplemental oil import license fee system amount to $4.8 billion per year. The staggering amount of this levy is underscored by the fact that the total revenues from all tariffs imposed by authority of Congress during fiscal 1974 were $4.3 billion.[15] The President asserts the right, therefore, with a stroke of a pen to more than double the levies on imports by imposing fees on one article of commerce. Moreover, the fees authorized by Proc. 4341 would be at least 16 to 18 times greater than the highest tariff imposed on oil in the nation's history.[16]

Literally read, the broad language of § 1862(b) (to "take such action . . . as he deems necessary") could be construed to vest in the President the power: (a) to employ indirect methods of import control such as subsidies to domestic producers, users, importers or exporters; (b) to impose, modify or repeal internal tax measures affecting participants in the oil industry, such as excises, depletion allowances, tax credits, or other

[15] White House Fact Sheet, A. 249. U.S. Customs Service, Activity Report Fiscal Year 1974. The U.S. Customs Service confirms, as total revenues raised by tariffs, the amounts of $4,267,764,678 for 1974, $4,093,494,555 for 1973, and $4,197,347,810 for 1972.

[16] The highest rate of duty imposed on oil under the Tariff Act of 1930 is approximately $.20/bbl ($.005/gal.). 19 U.S.C. 1202; Tariff Schedules of the U.S., Sched. 4, Pt. 10, Item 475.05 *et al.* The combined first- and second-tier fees imposed by Proc. 4341 for finished petroleum products amount to $3.63/bbl; for crude oil such fees amount to $3.21/bbl.

incentives or disincentives; (c) to modify U.S. flag shipping requirements; (d) to impose foreign exchange controls; (e) to establish strategic petroleum reserves; or (f) to compel increases in domestic oil production, procurement or usage standards.[17] The statute could also be literally read to authorize the President unilaterally to impose energy conservation measures such as closing of filling stations, shops and public buildings. He could reduce speed limits, ration heating oil, decree year-round daylight saving time, impose excise taxes on large automobiles, impose windfall profits taxes and regulate oil and natural gas prices. All these measures would indirectly affect petroleum import levels.[18]

While the extreme generality of § 1862(b) makes such extravagant interpretations possible, the question remains whether it is appropriate for this Court to so construe the section. In the words of Mr. Justice Cardozo, the question is "which choice is it the more likely that Congress would have made?" *Burnet* v. *Guggenheim*, 288 U.S. 280, 285 (1933).

The decision of the court of appeals held that § 1862(b) limited the President to the imposition of "direct" import controls such as quotas, in contrast to "indirect" import controls such as tariffs or license fees. Only this limited interpretation is consonant with the language and intent of the Congress in enacting § 1862(b).

[17] *See* World Oil Developments and U.S. Oil Import Policies, A Report Prepared For The Committee On Finance by the U.S. Tariff Commission, 93d Cong., 1st Sess. 111-112 (1973) (hereinafter the Tariff Commission Report).

[18] All of the foregoing measures were adopted in either Europe, Japan or the United States in response to the 1973 "energy crisis." *Cf.* Fried and Schultze, eds., *Higher Oil Prices and the World Economy*, 77-78, 86-87, 127, 148 (1975).

Contrary to the petitioners' assertion that the statute does not distinguish between direct and indirect methods of import control, the language of § 1862(b) itself contains the standard by which the exercise of unrestrained and unreviewable powers may be narrowed, *i.e.*, the words "adjust the imports." These words clearly modify and limit the sweeping generality of the preceding language, "take such action . . . as he deems necessary."[29] In the only reported judicial interpretation of these words, Judge McGowan characterized § 1862(b) exclusively as a quota provision:

> [A]ction shall be taken "to adjust the imports" of the article in question, *which means that the article may by regulation be excluded from entry or withdrawal from warehouse*. *Consumers Union of U.S.* v. *Kissinger*, 506 F. 2d 136, 142 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (quoted with emphasis at Pet. App. 22a).

The limitations inherent in the use of the term "adjust the imports" emerge when one considers the fundamental economic difference between a quota and a tariff (or license fee) as a means of controlling imports.[30] A quota affects imports directly and price only indirectly. A tariff (or license fee) affects price directly and imports only indirectly, through the impact of increased prices on consumer decisions. Only in the case of a quota system does one "adjust the imports" by di-

[29] The words "take such action . . . as he deems necessary" are implementary only and do not constitute an independent grant of authority to take any action other than to carry out the statutory directive "to adjust the imports." *Cf. New England Power Co.* v. *Federal Power Commission*, 467 F. 2d 425, 430-431 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974).

[30] Tariff Commission Report, 113 *et seq.* *See*, Chacholiades, *The Pure Theory of International Trade*, 395. Of course, in the extreme situation, a confiscatory tariff would have the same effect as an embargo, since no one would then import oil into the United States. Although the President theoretically has the power to embargo foreign oil under § 1862(b), this does not imply the power to impose tariffs. The power to destroy does not imply the power to tax.

rectly varying the quota levels; where a license fee or tariff is involved, one "adjusts the tariff" in hopes that import levels will change.

The restrictive meaning of the term "adjust the imports" becomes clearer if one compares the language of § 1862(b) with the language Congress uses when referring to the power to impose duties. Section 1862(a) limits the President's power to decrease or eliminate any "duty or other import restriction" on articles affecting the national security. Congress, if it intended, could have used that language when it enacted § 1862(b) in 1955, by authorizing the President to impose a "duty or other import restriction" to meet a threat to the national security. The term "duty or other import restriction" is a term of art, embracing both a duty and "a limitation, prohibition, charge, and exaction other than duty, imposed on importation or imposed for the regulation of importation" (19 U.S.C. 2481(2)), and is used throughout Title 19.[31]

Throughout the U.S. Code, the term "adjust" is used to denote a fixed, quantitative measure. Nowhere in the Code does the term refer to a measure which by a series of intervening causes seeks to achieve an uncertain objective.[32] In contrast, a tariff or license fee is a notoriously imprecise and indirect method of controlling imports — a bludgeon rather

[31] Prior to the Trade Act of 1974, the term could be found in 19 U.S.C. 1351(a)(1), 1360(a), 1841(a), 1844, 1845, 1845(a), 1861(a), 1881 and 1882(a)(3) (1841-61, 1881-82 repealed by P.L. 93-618).

[32] The term "adjust" or its variants is used throughout the Internal Revenue Code in a fixed, quantitative sense ("adjusted gross income," "adjusted basis," "adjusted sales price," etc.). Other examples include "adjustment" of rates of compensation (2 U.S.C. 61c-1; 5 U.S.C. 5348), accounts (2 U.S.C. 81b), insurance premium rates (5 U.S.C. 8714), interest rates (7 U.S.C. 903), agricultural allotments (7 U.S.C. 1132), agricultural prices (7 U.S.C. 1301), farm quotas (7 U.S.C. 1326), military rank (10 U.S.C. 5767), claims (10 U.S.C. 2734), rental charges (12 U.S.C. 1701s), financial statements (12 U.S.C. 1726), odometer readings (15 U.S.C. 1987), boundaries (16 U.S.C. 81m), value of merchandise (19 U.S.C. 170a), industrial disputes (29 U.S.C. 151), weights (31 U.S.C. 348, repealed), annuities (45 U.S.C. 228f), and government contract prices (50 U.S.C. App. 1231).

than a scalpel.[33] In the area of national security, a monetary exaction as opposed to a quota is a particularly undesirable method of import control.[34]

Unlike a fee or tariff, a quota may discriminate among foreign import sources without fear of violating international obligations such as the General Agreement on Treaties and Tariffs[35] or most-favored-nation provisions of treaties.[36] Unlike a fee or tariff, a quota may discriminate among domestic users without fear of violating the uniformity clause of the Constitution.[37]

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[33] *See, e.g.*, Affidavit of Wassily Leontief, A. 186.

[34] In the words of the Senate Finance Committee:

> There are serious practical problems in substituting a tariff for a quota in the regulation of oil imports. The volatility of freight rates, the geographic distribution of the world's oil reserves, and various pricing and taxing policies by foreign governments are important factors which would make the substitution of tariffs to regulate oil imports very costly and inefficient. No tariff can be so scientifically set as to reasonably regulate the level of imports in accordance with the needs of national security. . . . [W]henever a national security matter is concerned importations of the commodity involved should be set at a level so as to provide a reasonable degree of certainty that they will not impair the national security. This cannot be done effectively by a tariff or duty scheme. S. Rep. No. 91-1431, 91st Cong., 2d Sess. 251 (1970). *See also*, 116 Cong. Rec. 41807, December 16, 1970 (comments of Senator Long).

[35] 61 Stat. Parts 5 and 6 (1947). Under GATT all trade negotiations center on mutual *tariff* reductions. In emergencies, when trade policy considerations give way to overriding national security interest, *quantitative* restrictions (*i.e.*, quotas) are the accepted device. In this regard the Oil Import Program has been internationally justified under the article entitled "Security Exceptions." *See* Tariff Commission Report 99-109; Dam, *The GATT, Law and International Economic Organization*, 148-66 (1970); Jackson, *World Trade and the Law of GATT*, 681-687 (1969).

[36] Tariff Commission Report 108-109, citing bilateral treaty obligations with Iran, Iraq, Saudi Arabia and Venezuela.

[37] U.S. Const., art. I, § 8, cl. 1. ("all Duties, Imports and Excises shall be uniform throughout the United States"). *See* Section IID 2, *infra*. As the Tariff Commission Report points out:

> [T]ariffs are administratively less flexible than quotas because . . . they invite scrutiny for conformity with GATT rules, whereas quotas operate under [no such] constraint. Moreover, because of the absence of these constraints, quotas can be used as instruments of policy-oriented discrimination among import sources and/or domestic importers. It should also be noted that tariffs are more likely to run into constitutional difficulties than quotas, since the former are subject to a uniformity requirement not applicable to quotas. P. 123.

Tariffs, license fees, and other indirect methods of import control invariably have far-reaching and unpredictable effects upon the economy. Indeed, a quota system and a tariff system would operate differently in the circumstances of this case. The stated objective of the President's program is to limit imports of oil by 500,000 barrels per day (A. 249, 269), about 8½ per cent of the Nation's daily imports during 1974 (A. 176).[38] These reductions could have been accomplished precisely by a quota system,[39] without large-scale disruption to the economy in the Northeast. However, the President opted for an enormous increase in the import license fees which, among other things: (a) substantially increased governmental revenues, thus channelling funds from the private sector to the public sector; (b) resulted in substantial increases in domestic prices for oil and oil products by removing foreign oil from effective price competition with domestic oil; and (c) in fact fell far short of the desired goal of effecting reductions in petroleum imports.[40]

In enacting § 1862(b) in 1955, Congress directed the President under appropriate circumstances only to adjust imports, *i.e.*, to increase or decrease the supply of foreign commodities.

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[38] The reason a large increase in price is required to produce a small decrease in demand is that demand for oil has a very low elasticity. *Cf.* Yager and Steinberg, eds., *Higher Oil Prices and the World Economy*, 227; Von Haberler, *The Theory of International Trade*, 227-232.

[39] A quota of 5.3 million barrels per day (500,000 barrels less than the 1974 levels) would have accomplished this objective precisely.

[40] Crude oil imports in 1975 increased to 4.1 million bbl/day, an 18% increase over the 1974 figure of 3.5 million bbl/day. *FEA Monthly Energy Review* (February, 1976).

Yet the program instituted by President Ford in 1975 was not a program aimed at adjusting foreign supply but rather a program meant to diminish domestic demand. The White House Fact Sheet described the effect of the program as follows:

> [T]he fee will place an upward pressure on the price for crude [oil]. . . . [T]he price of uncontrolled domestic crude will rise to meet the world price. . . . As a result of these measures, petroleum products will become more expensive relative to other goods and services, thereby encouraging conservation and discouraging consumption. (A. 289-290.) *See also*, A. 222, 224.

The President's program was thus designed not to discourage imports, but to increase prices of all oil, foreign and domestic, and thus to encourage domestic energy conservation efforts.[41] It was, in effect, a domestic price decontrol program embarked upon under the guise of an "adjustment" of imports.[42] As

[41] This point is most clearly illustrated by the President's proposal to couple a permanent $2.00/bbl import license fee with an equivalent excise tax on domestic crude oil (A. 270). This scheme is a paradigm of an import duty with no protective effect, *i.e.*, one which does not adjust imports at all. *See* Ellsworth, *The International Economy*, 216 (3d ed. 1967) ("a duty can be made to have no net protective effects if domestic production of the commodity subject to duty also has imposed on it a domestic excise tax equal to the import duty"). The alternative of imposing an excise tax lower than the import fee, which would have some protective effect, was expressly rejected by the White House (A. 294).

[42] At the time the second-tier license fee program was announced, the President declared he would take administrative action to remove domestic price controls on oil, subject to Congressional disapproval under § 4(g) of the Emergency Petroleum Allocation Act, 15 U.S.C. 753 (g) (A. 249-250). The President also sought legislation to impose permanent license fees on imports and excise taxes on domestic oil and natural gas (A. 250), a windfall profits tax (A. 250), and a pass-through of these taxes by permanent tax reductions and payments (A. 252). The license fees imposed under § 1862(b) were to be "interim administrative actions" which would be "rescinded when the necessary legislation is enacted" (A. 232). This legislation was never enacted.

such, the President's program is in irreconcilable conflict with the price control program mandated by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq*. That Act directs the President to "strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs." *Consumers Union of U.S.* v. *Sawhill*, 525 F. 2d 1068, 1074 (T.E.C.A. 1975), citing H.R. Rep. No. 93-628, 93d Cong., 2d Sess. 26 (1974).

In the *Consumers Union* case the court of appeals *en banc* held that the two-tier price control program imposed by the FEA (and described at A. 327-332) conformed with the legislative mandate, even though the prices of certain types of domestic oil were allowed to float with the market price. However, the court cautioned that:

> this is not to say that FEA may, consistent with its statutory responsibilities, unilaterally implement changes in its regulatory scheme not contemplated by Congress and not reflective of a balancing approach. *Id.*, at 1071.

The action of the FEA in artificially raising the prices of domestic and imported oil by over 20 per cent above the market price[43] cannot be considered to be in conformity with the statutory directive to consider "holding down spiraling consumer costs."

[43] The second-tier license fee program was predicted to raise domestic prices by five cents a gallon or about $2.10 per barrel (A. 291). This would be a 21% increase over the $10.00 per barrel price for uncontrolled domestic oil in effect on the date of Proc. 4341 (A. 330).

The conflict between the license fee program and federal price control legislation is even more apparent under the Energy Policy and Conservation Act of 1975, P.L. 94-163. That Act requires the President to promulgate rollback ceiling prices resulting in a weighted average sales price for crude of $7.66 per barrel, subject to upward adjustments not to exceed 10 per cent *per annum*. It is true that the President removed the supplemental license fee as soon as this Act was passed (Proc. 4412, 41 Fed. Reg. 1037). Had he not done so, he would have been in the untenable position of (a) imposing price controls required by the Act and (b) cancelling the effect thereof by effecting price increases on imported oil.

It is not respondents' role to question in this forum the wisdom of the President's economic and energy programs. But respondents do urge that Congress, when it enacted § 1862(b) in 1955, never intended the narrow power to adjust imports to be a charter for the implementation by the executive branch of a new national economic and energy policy.

C. *Authority To Impose Import License Fees May Not Be Implied Without A Clear Statutory Directive.*

The court of appeals determined that the import license fee program is "substantively a duty system" (Pet App. 26a), a result not seriously disputed by the petitioners (Pet. Br. 19). Section 1862(b) nowhere mentions the terms "duty," "tax," "tariff" or "license fee." Any authority for the imposition of such exactions must therefore be derived by implication from the general language of that section.

The absence of explicit reference to the tariff power in § 1862(b) is fatal to the petitioners' claim for two reasons. First, as a general principle of statutory interpretation, the power to tax may not be implied without a clear directive from Con-

gress. Second, the history of tariff and trade legislation manifests a consistent Congressional intent to guard its taxing power jealously. To interpret § 1862(b) to authorize the imposition of massive fees would be contrary to this manifest intent.

1. A Delegation Of The Taxing Power Requires A Clear Statement From Congress.

In certain situations a legislative body which desires to exercise or delegate a power must do so plainly and unmistakably. For example, statutes in derogation of the common law or statutes imposing penal sanctions are construed strictly. *See*, 3 Sutherland, *Statutory Construction*, Chapters 59, 61, 62 (4th ed. 1973). It is likewise an established principle of statutory construction that statutes delegating the taxing power are to be narrowly construed. *Id.*, § 66.05. These rules of strict construction embody a public policy of "clear statement," which:

> forbids a court to understand a legislature as directing a departure from a prevailing principle or policy of the law unless it does so clearly. This policy has special force when the departure is so great as to raise a serious question of constitutional power. Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, p. 1413 (Tent. Ed., 1958).

As expressed by this court in *Girouard* v. *United States*, 328 U.S. 61, 64 (1946), the policy of clear statement requires that the courts:

> not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

In the recent case of *National Cable Television Assn.* v. *United States*, *supra*, at note 22, this Court affirmed in language virtually identical to that used in *Girouard* — that it would be "a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power . . ." (*Id.*, at 341).[44] That case involved the validity of "runaway" license fees which exceed the value to the recipient of the governmental services provided, and which thus invade the taxing power entrusted to Congress. The Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a, provided in relevant part that:

> [T]he head of each Federal Agency is authorized by regulation . . . to prescribe . . . such fee, charge or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts. . . .

[44] Throughout our constitutional history the taxing power has been recognized as a dangerous instrumentality, the exercise of which must be carefully controlled. In Chief Justice Marshall's indelible words, "the power to tax involves the power to destroy." *M'Culloch* v. *Maryland* 17 U.S. (4 Wheat.) 316, 431 (1819).

That power has been entrusted by Article I, § 8, cl. 1, of the Constitution to the Congress, as the deliberative and representative branch of government, rather than to the Executive, because of the potential for its tyrannical exercise. *See*, Locke, *The Second Treatise of Civil Government*, § 140 (Laslett ed., 1960); Montesquieu, *The Spirit of the Laws*, Bk. XI, ch. 6; Fisher, *President and Congress*, 86 (1972); Crosskey, *Politics and the Constitution*, 494-5 (1953).

The Federal Communications Commission relied upon the general language of that statute as authority to impose annual "fees" on CATV systems at the rate of $.30 per subscriber. Such fees were expected to produce $1,145,400 in revenues annually. 415 U.S. at 340.

This Court held that the fees there imposed were so excessive as to go beyond the commonly accepted meaning of a fee. Applying the principle that a delegation of the taxing power requires a clear statement from the Congress, this Court held the fees invalid as beyond the scope of the Act:

> It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 483a narrowly as authorizing not a "tax" but a "fee." . . . The [statutory language] "public policy or interest served, and other pertinent facts," *if read literally*, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House. 415 U.S. at 341 (emphasis in original).

Likewise, in *Federal Power Commission* v. *New England Power Co.*, *supra*, at note 22, this Court construed the Independent Offices Appropriations Act to authorize only fees bearing a reasonable relation to benefits conferred by governmental activity:

> Though [this construction] greatly narrows the Act from the dimensions urged by the Commission, it keeps it within the boundaries of the "fee" system and away from the domain of "taxes" toward which the Commission's "economic climate" argument would lead. 415 U.S. at 351.

The license fees involved in this case, like those involved in the *National Cable Television* and *New England Power* cases, are "runaway" license fees which exceed the value of the benefit conferred upon the recipient. Unless restrained by a narrow reading of § 1862(b), such fees will trespass upon the taxing power.

A license fee is normally a charge imposed by a sovereign for the exercise of a privilege.[45] In determining whether a license fee is valid, the courts will look to substance rather than form. *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1866); *Cooley* v. *Bd. of Wardens*, 53 U.S. (12 How.) 299, 314 (1851); *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 444 (1827). To hold that the license fee system under consideration here represents true "license fees" would exalt form over substance. Rather, they are license fees stretched beyond their limited permissible function.

The court of appeals stated that it could "see no logical or realistic basis of disputing the Tariff Commission's comment that 'the new program is substantively a duty system'" (Pet. App. 26a). The Tariff Commission Report, after an extensive consideration of the legal basis for the imposition of import license fees, concludes that:

[45] The case of *National Biscuit Co.* v. *City of Philadelphia*, 374 Pa. 604, 98 A. 2d 182, 188 (1953), provides a useful definition of a license fee, as follows:

> The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

> [T]he President has created a new mechanism for import adjustment called a license fee. The analysis, however, suggests that what Proclamation 4210 does is substitute a duty system for the quota mechanism of the Mandatory Oil Import Program, for the license fee has the incidences of a duty. The name is new and the administration has been shifted from the Department of the Treasury, [U.S.] Customs Service to the Department of the Interior. Nonetheless, the new program is substantively a duty system. (Tariff Commission Report 97.)

The President's lack of authority to impose import duties cannot be cured by the transparent device of enacting such duties under the title of "license fees." To permit such a scheme would in effect enable the President to disregard stringent statutory and constitutional restraints with regard to the imposition of import duties.

2. The Manifest Intent Of Congress Under The Trade Acts Has Been To Limit The Delegation Of The Tariff Power.

The language employed by the various provisions of the tariff and trade expansion acts clearly demonstrates that Congress, whenever it determines to delegate some of its taxing power to the President, does so in explicit and unambiguous terms.

The court of appeals "generalize[d] from [its] examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-

defined goals" (Pet. App. 13a).[46] The contemporaneous or related legislative provisions cited by the court of appeals for this proposition are excerpted in the margin.[47]

[46] For a non-trade illustration of explicit delegation, *see* § 22 of the Agriculture Adjustment Act, 7 U.S.C. 624, authorizing the imposition by proclamation of fees or quotas on agricultural imports.

[47] Section 201 of the Trade Expansion Act of 1962, 19 U.S.C. 1821, which authorizes the President to:

> proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement.

Section 351 of the Trade Expansion Act of 1962, 19 U.S.C. 1981, which authorizes the President, after a Tariff Commission investigation finding injury to domestic industry (under 19 U.S.C. 1901), to:

> proclaim such increase in, or imposition of, any duty or other import restriction on the article causing or threatening to cause serious injury to such industry. . . .

Section 257 of the Trade Expansion Act of 1962, 19 U.S.C. 1351, which authorizes the President to enter into foreign trade agreements, and:

> [t]o proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement. . . .

Section 203 of the Trade Act of 1974, 19 U.S.C. 2253, which authorizes the President to provide import relief to threatened domestic industry, and, in connection therewith, to:

> proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry. . . .

Section 201 of the Trade Act of 1974 is remarkably similar to § 1862(b). Under § 201 the International Trade Commission is authorized to make an "investigation to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Following such finding, the Commission reports to the President who is directed to provide "import relief" to the domestic industry under § 202(a). However, the authority of the President to provide import relief is very clearly and explicitly spelled out in § 203(a). He may:

> (1) proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry;
>
> (2) proclaim a tariff-rate quota on such article;
>
> (3) proclaim a modification of, or imposition of, any quantitative restriction on the import into the United States of such article;
>
> (4) Negotiate orderly marketing agreements with foreign countries limiting the export from foreign countries and the import into the United States of such articles; or

Section 122 of the Trade Act of 1974, 19 U.S.C. 2132, which authorizes the President to meet balance-of-payments emergencies, by proclaiming for not more than 150 days:

> (A) a temporary import surcharge, not to exceed 15 percent ad valorem, in the form of duties (in addition to those already imposed, if any) on articles imported into the United States;
>
> (B) temporary limitations through the use of quotas on the importation of articles into the United States; or
>
> (C) both a temporary import surcharge . . . and temporary limitations. . . .

Such specific provisions show that Congress, when it intends to delegate the power to impose duties, does so in explicit terms. The court of appeals concluded that "[f]itted against this scheme, the Government interpretation of § 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area" (Pet. App. 14a). Petitioners concede that "other statutes delegating to the President the authority to impose or alter import controls have frequently circumscribed that authority more narrowly or more explicitly" than § 1862(b) (Pet. Br. 49-50). However, petitioners assert that this "contrast shows that Congress has known how to confine such delegations closely when it has so desired" (Pet. Br. 50). Thus, petitioners conclude, § 1862(b) "was intended to confer the authority exercised by Presidents Nixon and Ford." (*Ibid.*)

Petitioners' conclusion proceeds from an erroneous major premise, *i.e.*, if Congress wishes to preserve its constitutional prerogative to tax, it must hedge broad delegations to the Executive branch with explicit denials of this power. This argument lacks merit. The unfettered delegation of the taxing power to the Executive constitutes a sharp break with our traditions. *National Cable Television*, 415 U.S. at 341. Thus the presumption is precisely contrary to petitioners' assertion.

In *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973), this Court considered whether an ambiguous "catch-all" provision of the Shipping Act authorized the Federal Maritime Commission to approve acquisition agreements. This Court concluded that:

> [A]n examination of contemporaneous and related statutes makes clear that when Congress intended to bring acquisitions and mergers under control, it did so in unambiguous language. . . .
>
> In light of these specific grants of merger approval authority, we are unwilling to construe the ambiguous provisions of § 15 to serve this purpose. . . . If, as petitioner contends, there is now a compelling need to fill the gap in the Commission's regulatory authority, the need should be met in Congress. . . . We are not ready to meet that need by rewriting the statute and legislative history ourselves. 411 U.S. at 742, 744-745. *See also, Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975).

Since Congress has not clearly stated that the President is empowered to impose fees or tariffs, this Court should hold that § 1862(b) does not authorize the action taken under Procs. 4210 and 4341.

D. *Section 1862(b) Must Be Interpreted Narrowly In Order To Avoid Serious Constitutional Questions.*

As expressed by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936):

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (Brandeis, J., concurring, quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).)

If the President's interpretation of § 1862(b) were accepted, two serious constitutional issues would be raised.

1. The Statute Should Be Construed To Avoid An Unconstitutional Delegation Of The Tariff Power.

If § 1862(b) were given the limitless reading petitioners propose, a serious question of unconstitutional delegation of legislative power would be presented. The *National Cable Television* and *New England Power* cases, *supra*, are pertinent precedents on this issue. The statute construed in *National Cable Television* authorized Federal agencies to impose fees determined:

> to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts*. . . . 31 U.S.C. 483a (emphasis supplied).

The Court held there that such standards were so imprecise as to pose a serious constitutional question under the delegation doctrine:

> Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.[48]

[48] 415 U.S. at 342, referring to *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Hampton & Co.* v. *United States*, 276 U.S. 394 (1928).

The standards provided in § 1862 are no less imprecise. The President is authorized under § 1862(b) to "take such action, and for such time, as he deems necessary to adjust the imports of such article. . . ." Section 1862(c) is similarly broad. It instructs the President to consider "*without excluding other relevant factors*" (emphasis supplied) such matters as domestic production, domestic capacity, human resources, products, raw materials, industrial growth, investment, exploration, development, the economic welfare of domestic industries, unemployment, decrease in government revenues, loss of skilled employees, and weakening of the internal economy. These factors taken together amount to a consideration of the economic welfare of the nation as a whole. They rival in breadth the provisions of the National Industrial Recovery Act of 1933 struck down in *Schechter*.

The viability of the delegation doctrine has been questioned by some commentators, particularly Professor Kenneth Culp Davis.[49] However, as the *National Cable Television* case demonstrates, "the reports of its death are greatly exaggerated." The vitality of the doctrine has been expressed of late not in the dramatic invalidation of statutes by the judiciary, but in the preservation of their constitutionality by strict judicial interpretation. Professor Jaffe calls this process "the technique of *Kent* v. *Dulles*." Jaffe, *Judicial Control of Administrative Action* 72 (1965). In *Kent* v. *Dulles*, 357 U.S. 116 (1958), Rockwell Kent was denied a passport because he was a Communist. The Secretary of State asserted that under the relevant statute the power to issue passports was "wholly discretionary." This Court, citing *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-430 (1935), held that the statute must be narrowly interpreted to avoid constitutional challenge. In Professor Jaffe's words:

[49] 1 K. Davis, *Administrative Law Treatise* 76 (1958); *cf.* H. Friendly, *The Federal Administrative Agencies: The Need for a Better Definition of Standards* 21 (1962).

> Here the interpretative process is used to provide a standard in order to save the statute from the condemnation of excessive delegation. Thus paradoxically a power unlimited in terms is given a very restricted meaning — a meaning deduced from the ostensible purpose of the statute or from the particular practices which have prevailed under it. Jaffe, *op. cit.*, at 73.

If it can be said that no statute delegating the *commerce* power has been held unconstitutional under the *Schechter* doctrine in recent years, it can be said with equal vigor that no statute involving as broad a claimed delegation of the *taxing* power as § 1862(b) has ever been upheld. The delegation doctrine as applied to the taxing power is particularly stringent. This principle is summarized in *Star-Kist Foods, Inc.* v. *United States*, 275 F. 2d 472 (C.C.P.A. 1959), as follows:

> A constitutional delegation of powers requires that Congress enunciate a policy or objective or give reasons for seeking the aid of the President. In addition the act must specify when the powers conferred may be utilized by establishing a standard or "intelligible principle" which is sufficient to make it clear when action is proper. And because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner. This means that Congress must tell the President what he can do by prescribing a standard which confines his discretion and which will guarantee that any authorized action

> he takes will tend to promote rather than flout the legislative purpose. 275 F. 2d at 480.[50]

Section 1862(b) gives the President no guidance as to the rate of tax or method of determining a tax to be imposed.

This Court should preserve the constitutionality of § 1862(b) by interpreting it not to authorize the imposition of fees or tariffs. Such an interpretation would reflect not only the general presumption that Congressional acts are constitutional, but also the intention of Congress, expressed in debate and reflected in legislation, that the powers delegated to the President under the tariff acts should be tightly confined.[51]

[50] In *Pan American Standard Brands, Inc.* v. *United States*, 177 F. Supp. 769 (Cust. Ct. 1959), the Puerto Rico legislature, acting pursuant to provisions of the Tariff Act of 1930, imposed a duty on coffee, and empowered the Secretary of Agriculture and Commerce to increase or decrease such duty in any amount "when market conditions may warrant it and for the purpose of protecting the consumer or the coffee industry."
The court there held the "market conditions" standard too indefinite to meet the *Schechter* test:

> The Act contains no definition of circumstances or conditions which would call for the exercise of the delegated power by the Secretary to protect the consumer or the coffee industry. No standard is provided to aid him in determining when market conditions may warrant action. *There is no standard* to which the Secretary must conform in his determination of the rates to be imposed under the tariff-fixing power. 177 F. Supp. at 775.

[51] *See*, Senator Ervin's lengthy exegesis to that effect during the debate on the Trade Agreements Extension Act of 1958. 104 Cong. Rec. 10463-64 (1958). The same concern was manifested during debate on the Trade Expansion Act of 1962. Representative Wright of Texas commented:

> Members of the committee are surrendering no congressional control. We are delegating under the Constitution those duties which we are charged by the Constitution with delegating. We are delegating them with certain clearly prescribed congressionally imposed limitations upon Presidential authority. 108 Cong. Rec. 12057.

Other provisions of the tariff and trade statutes of the United States existing at the time § 1862(b) was enacted illustrate proper methods of limiting executive power by circumscribing its exercise. Several of those statutes are excerpted in the margin.[52] Accordingly, § 1862(b) should be interpreted

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In a similar vein Senator Humphrey commented:

> There are those who charge that the Trade Expansion Act would result in the full and complete abandonment of the constitutional authority of Congress to regulate tariffs. This act would do nothing of the kind. What it does is to continue for a limited fixed period the delegation of authority to set tariff rates within limits defined by Congress and with well-established safeguards that have been in effect since 1934. 108 Cong. Rec. 19867.

The most recent expression of Congressional concern and sensitivity to the constitutional issues presented by the delegation of powers under trade legislation may be found in the Senate Finance Committee Report on the Trade Act of 1974. In explaining why numerous amendments to the House bill were required, the Committee states:

> As passed by the House, the bill represented the largest delegation of trade negotiating authority to the Executive in history. The Finance Committee's amendments seek to establish appropriate and constitutionally-sound guidelines and criteria to govern the exercise of the authority granted by the bill. S. Rep. No. 93-1298, 93d Cong., 2d Sess. 14 (1974).

[52] The Antidumping Act, as amended, 19 U.S.C. 160 *et seq.*, authorized the President to impose a special dumping duty equal to the difference between the price of the article in the country of origin and the lower export price to the U.S. market.

The provisions of the Tariff Act, 19 U.S.C. 1303, authorized the President to impose a special "counter-vailing duty" equal to the net amount of the "bounty or grant" paid or bestowed by the foreign country in respect to such articles.

The "escape clause" provisions of the Trade Agreement Extension Act of 1955, 19 U.S.C. 1981(b), authorized the President to increase existing rates of duty on imported articles up to 50% above the rate existing on July 1, 1934.

to preclude the imposition of fees, in order to obviate problems of constitutionality and give effect to the manifest legislative intent under the trade agreements acts.

2. The Import License Fee System Would Contravene The Constitutional Requirement That All Import Duties Be Uniform Throughout The United States.

The interpretation of § 1862(b) advanced by petitioners would give rise to a claim that the imposition of import license fees under Proc. 4210 violates the uniformity clause of the Constitution. Article I, § 8, cl. 1, of the Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." The purpose of this clause is to protect the States, which united in forming the Constitution, from discrimination by Congress. *Downes* v. *Bidwell*, 182

The "flexible tariff" provisions of the Tariff Act, 19 U.S.C. 1336, authorized the President to impose a duty equal to the difference in the foreign and domestic costs of production of the article.

Section 22 of the Agricultural Adjustment Act of 1933, 7 U.S.C. 624, authorized the President to impose fees on imported agricultural commodities not in excess of 50% *ad valorem*.

Petitioners cite the "escape clause," § 351 of the Trade Act of 1974, 19 U.S.C. 1981, and the Trading With the Enemy Act, 50 U.S.C. App. 5(b), as examples of broad delegations of the taxing power (Pet. Br. 50-51). Neither statute is relevant to this inquiry. As petitioners admit, the escape clause contains an *explicit* delegation of the taxing power and is hedged with restrictions on the amount of tax which may be imposed (Pet. Br. 51-52). Whether the Trading With the Enemy Act authorizes the President to impose a tax is still an issue unsettled by this Court. In *United States* v. *Yoshida International*, 526 F. 2d 560 (C.C.P.A. 1975), the Court of Customs and Patent Appeals held that the Trading With the Enemy Act authorized the President to impose a "limited surcharge" within the existing tariff limits. In the court's words, this "is quite different from 'imposing whatever tariff rates he deems desirable.'" 526 F. 2d at 579.

U.S. 244 (1901). Consistent with these purposes, the clause has been interpreted to require that duties, imposts and excises be applied uniformly to the several States, regardless of the differing burdens or effects upon individuals in different parts of the United States which may result from local differences.

The import license fee system employed by the President artificially classifies the States into five geographical districts[53] and imposes a fee on the quantity of oil imported, on a per barrel basis, into each of the districts. The import fee system directly discriminates among these districts by unequally allocating to each district the amount of fee-free oil which may be imported.[54] Once these fee-free allocations for states in one district are exhausted, import fees are imposed. At the same time, however, the importation of the same item in other States will not be taxed as a result of the discriminatory classification system.

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[53] Proc. 4210, §§ 15(b)-(e).

[54] Presidential Proclamation 3279, as amended through January 23, 1975, allocates fee-free oil as follows:

> Districts I-IV are allowed 1,992,000 average barrels of crude oil, unfinished oils, and finished products (other than residual oil to be used as fuel) per day per year, with special provisions for additional 50,000 barrels of No. 2 fuel in District I, § 2(a)(1);
>
> District V receives 670,000 average barrels per day per year, § 2(a)(2);
>
> Puerto Rico receives 227,221 average barrels per day per year, § 2(a)(3);
>
> District I receives 2,900,000 barrels of residual oil to be used as fuel per day per year, § 2(a)(4);
>
> Districts II-IV receive 42,000 barrels, § 2(a)(5);
>
> District V receives 75,600 barrels, § 2(a)(6).

The Tariff Commission has pointed out that the present import fee system will result in different import duties on the same item in different ports, directly as a result of geographic location in the United States:

> This [license fee system] violates the requirement of geographic uniformity, because the result is different duties in two ports on the same item the item being the xth barrel of oil. [i.e.: the point where exemptions expire for certain States]. Tariff Commission Report 99.

Thus, even if the President had been delegated the Congressional power to impose license fees, he would be in violation of the Constitution as a result of this discriminatory classification system. Section 1862(b) should therefore be interpreted so as to authorize the President to impose only direct import restrictions rather than "license fees."

E. *The Legislative History Demonstrates That Congress Did Not Intend To Delegate Authority To Impose A License Fee System Under § 1862(b).*

It is a proper and established rule of statutory construction that courts should look to the legislative history of a statute to determine its meaning. As the leading text on statutory construction declares:

> Such aids consist of background information about the circumstances out of which arose the generative forces which led to the enactment of a statute, events surrounding its enactment, and developments pertaining to its subsequent operation. All of these facts, taken together, can be said to comprise the history of a statute. . . .

> Probative historical data may be found in either legislative, executive, judicial, or nongovernmental sources. 2A Sutherland, *Statutory Construction*, § 48.01 (4th ed. 1973).

The petitioners' argument assigns considerable weight to two brief and equivocal statements made by individual legislators during the floor debate on the Trade Agreements Extension Act of 1955. These statements are said to support the petitioners' position that § 1862(b) constitutes a delegation of the taxing power. Respondents disagree. These comments must not be viewed in isolation, but rather in the context of the entire legislative history of that Act and in the broader context of the history of the United States trade policy in general. Viewed from these perspectives, these isolated remarks shrink to minor importance.

Moreover, the serious constitutional questions discussed in Section IID, *supra*, require the petitioners to sustain a heavy burden in establishing that the legislative history supports their interpretation of § 1862(b). As this Court recently observed in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974):

> "[w]hen one admissible construction will preserve a statute from unconstitutionality and another will condemn it, the former is favored even if language, . . . and arguably the legislative history point somewhat more strongly in another way." Quoting district court opinion, 384 F. Supp. at 946.

1. The History Of The Tariff And Trade Expansion Acts Negates Any Claim Of License Fee Power Under § 1862(b).

The predecessor to § 1862(b) was first enacted as part of the Trade Agreements Extension Act of 1955. This Act was the tenth act extending the Trade Agreements Act of 1934. These acts and their three successors[55] explicitly refer back to the Smoot-Hawley Tariff Act of 1930, c. 497, 46 Stat. 590, as their foundation. Section 1862(b) can be properly construed only within the framework of this tightly integrated series of legislative acts and the consistent themes sounded in their legislative history.

Viewed in this historical context, it becomes evident that § 1862(b) represents an isolated exception to the national trade policy of progressive reduction in tariff barriers. It would make the exception swallow the rule to construe § 1862(b) as authorizing the President to impose fees unlimited in amount, thus circumventing and frustrating the purpose of the trade expansion acts.[56]

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[55] Trade Agreements Extension Act of 1958, P.L. 85-686; Trade Expansion Act of 1962, P.L. 87-794; Trade Act of 1974, P.L. 93-618.

[56] This Court has recently reasserted the principle of statutory construction involved here, viz., that language of one provision of an Act of Congress which appears to grant broad discretion to the Executive cannot be read in such a way as to circumvent the balance of the Act. In *Train* v. *City of New York*, 420 U.S. 35 (1975), this Court considered the construction of § 207 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*, which "authorized to be appropriated" amounts "not to exceed" $5 billion, $6 billion and $7 billion for the fiscal years 1973, 1974 and 1975. The President had construed the terms "not to exceed" to grant executive discretion to impound any portion of these maximum appropriations.

There are a number of parallels between the impoundment case and the present action. In both, the controversy involved a governmental power vested by the Constitution exclusively in Congress. In both, the

The history of United States trade policy reflects a retreat from the rigid protectionism reflected in the Smoot-Hawley Act of 1930, c. 497, 46 Stat. 590, toward a policy of reduction in tariffs through reciprocal trade agreements between the United States and its trading partners.[57] Nineteenth century United States trade policy was dominated by a philosophy of developing American self-sufficiency through protecting our infant industries from foreign competition. By the late nineteenth century our domestic economy had developed to the point where a general national policy in favor of free competition was in force. That policy was most clearly expressed by the enactment of the Sherman Act in 1890.

Political forces favoring a nondiscriminatory trade policy of lower tariffs and lower domestic prices, led by Congressman Cordell Hull, had introduced legislation as early as 1916 for reciprocal reduction of tariffs through trade agreements. Such efforts were vigorously opposed by protectionist forces which generally prevailed in increasing tariff levels. The United States tariff wall reached the highest levels in the Fordney-McCumber Act of 1922, c. 356, 42 Stat. 858, and the Smoot-Hawley Act of 1930, resulting in protests and retaliatory meas-

Government claimed a delegation of broad executive authority under a particular provision incongruous with the Acts as a whole. In both, the Government further contended that executive discretion was not judicially reviewable. This Court concluded as follows:

> We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation. Yet such was the Government's position in the lower courts — combined with the argument that the discretion conferred is unreviewable. 420 U.S. at 45-46.

[57] This discussion is based in large part upon the brief but excellent history of U.S. trade policy contained in Metzger, The Trade Agreements Program (in Surrey and Shaw, *International Business Transactions*, 1963). *See also*, Bronz, *The Tariff Commission as a Regulatory Agency*, 61 Colum. L. Rev. 463 (1961); Metzger, *United States Foreign Trade: Past, Present and Future*, 6 Vill. L. Rev. 503 (1961).

ures by other countries. For example, in one year Switzerland's exports to the United States fell 30.5 per cent and her imports from the United States fell 29.6 per cent. The United Kingdom enacted retaliatory tariffs in 1931 and extended the tariff wall around the British Commonwealth by the Ottawa Agreement of 1932. The United States' share of world trade fell by almost 30 per cent from 1929 to 1933.

With the advent of the Roosevelt Administration and the enactment of the Trade Agreements Act of 1934, the national tariff policy commenced a gradual reversal from extreme protectionism toward expansion of foreign trade and lowering of tariffs. The Trade Agreements Act of 1934 authorized the President to enter into reciprocal trade agreements whenever he found that existing tariff barriers were unduly burdening foreign trade. The Act limited these reductions to 50 per cent of the 1934 (Smoot-Hawley) levels. The Trade Agreements Act of 1934, and each of its successors, delegated tariff-cutting authority to the President on a temporary basis, for periods of from one to four years. From 1934 to 1955 there were ten amendments and extensions of the Trade Agreements Act.[58]

In the Trade Agreements Extension Act of 1945 further reductions in tariffs were authorized by delegating to the President the power to reduce duties by 50 per cent of the 1945 rates. Thus, if a rate had already been reduced by 50 per cent of the Smoot-Hawley rates, it could be further reduced to 25 per cent of the Smoot-Hawley rates. The Trade Agree-

[58] Trade Agreements Extension Act of 1937, c. 22, 50 Stat. 24;
Trade Agreements Extension Act of 1940, c. 96, 54 Stat. 107;
Trade Agreements Extension Act of 1943, c. 118, 57 Stat. 125;
Trade Agreements Extension Act of 1945, c. 269, 59 Stat. 410;
Trade Agreements Extension Act of 1948, c. 678, 62 Stat. 1053;
Trade Agreements Extension Act of 1949, c. 585, 63 Stat. 698;
Trade Agreements Extension Act of 1951, c. 141, 65 Stat. 72;
Trade Agreements Extension Act of 1953, c. 348, 67 Stat. 472; and
Trade Agreements Extension Act of 1954, c. 445, 68 Stat. 360.

ments Extension Act of 1955, c. 169, 69 Stat. 162, authorized a further tariff reduction of 15 per cent. The Trade Agreements Extension Act of 1958, P.L. 85-686, authorized further tariff cuts of up to 20 per cent. The Trade Expansion Act of 1962, P.L. 87-794, authorized further reductions up to 50 per cent. The Trade Act of 1974, P.L. 93-618, authorized further decreases of up to 40 per cent.

Against this background of a gradual ratcheting-down of tariff barriers, it becomes evident that § 1862(b), added in 1955, represented a special exception to the national trade policy embodied in the Trade Agreements Act and the ten preceding extension acts. Its purpose was to prevent the lowering of trade barriers and the obligations of reciprocal trade agreements from impairing the national security.

The Smoot-Hawley tariff rates remain the touchstone of our tariff structure. As subsequently modified by reciprocal trade agreements, they still represent the basic tariff rates of the United States. 19 U.S.C. 1202. The Smoot-Hawley Act, like any tariff act, represents a Congressional accommodation between the benefits of protectionism and the burdens of taxation and higher prices occasioned by such protectionism. The Smoot-Hawley rates on crude oil, as set forth in the Tariff Schedules of the United States, are 0.5 cents per gallon or approximately 21 cents per barrel. T.S.U.S., Sched. 4, Pt. 10. The rates of duty set forth in those schedules reflect a Congressional determination made in 1930 under Article I, § 8, cl. 1, of the Constitution, of the sort described in *National Cable Television*, *supra*:

> The lawmaker may, in light of the "public policy or interest served," make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed. . . . 415 U.S. 341.

The actions of the President in Procs. 4210 and 4341 have therefore had the effect of using an exception to the national trade policy to impose rates of duty on oil over sixteen times greater than the highest previous levels in history. The fees authorized by Proc. 4341 were projected to raise approximately $4.8 billion per year, which is greater than the total revenues raised by the United States tariff system for fiscal 1974. In adopting Proc. 4341 the President thus frustrated the Congressional policy manifested in every piece of trade legislation since 1930 that the burdens of taxation and higher prices occasioned by Smoot-Hawley should not be increased.

One cannot read the record of Congressional debate of the Trade Agreements Acts during the post-war period without being struck by the clash of powerful opposing philosophies.[59] With each renewal the battle was joined again between the Protectionists who considered any foreign trade concessions inimical to national security and the Free Trade Advocates who sought the objective of U.S. world trade preeminence. In each of the years in which the Trade Acts were renewed, Protectionist Congressmen inveighed at length against the unconstitutionality of delegating to the executive branch the exclusive Congressional power to levy taxes and duties and to

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[59] Senator Mansfield in the 1955 Congressional debate commented:

> H.R. 1 has become the occasion for an old-fashioned, knockdown, drag-out, protectionist free-trade fight. . . . Opponents of the trade program often argue that tariff reduction in industries essential to national defense in time of war, endanger our mobilization base. . . . Since the introduction of H.R. 1 on the first day of the 84th Congress, the Nation's Capital has been bombarded with "protectionist" groups seeking to subordinate vital American interests to the creation of privileged, noncompetitive positions for a few industries. . . . These protectionists would cut off many imports. In short, they would insist that we use up our own scarce resources, rather than draw them to the fullest economical extent from nations more willing to sell from their own abundance. 101 Cong. Rec. 5312.

regulate foreign commerce.[50] In response, the proponents of the trade bills repeatedly claimed constitutional validity on the grounds that the language of the Act was specific and limited as to any authority delegated.[51]

The national security provision of § 1862(b) emerged as a product of the tension between these opposing philosophies. In effect, § 1862(b) represented a concession to the Protectionist wing of the Congress. As a consequence, to take § 1862(b) as authorization for the unprecedented import fees of Proclamations 4210 and 4341 would violate the Congressional intent from the vantage point of either the Protectionist or the Free Trade wings of the Congress which passed the Acts. Such a construction goes directly against the Protectionist rejection of any sweeping delegation of Congressional power to the President. It also abandons the Free Trade policy of employing presidential discretion to meet particular crises with minimal interference with international trade. It is unrealistic to imagine, as petitioners claim, that the Free Trade group of Congressmen would have given the President unlimited power to undo the progress of twenty years in removing trade barriers, or that the Protectionists would have granted such sweeping executive powers, without fierce debate.

As Mr. Justice Marshall observed in a related context, concurring in *Federal Power Commission* v. *New England Power Co.*, and dissenting in *National Cable Television Assn.* v. *United States*, 415 U.S. 345, 338, 357 (1974):

[50] *See, e.g.*, comments of Representative Bow of Ohio, 101 Cong. Rec. 1739-43, esp. at 1740; Minority Views of Senator Malone of Nevada, S. Rep. No. 232, 84th Cong., 1st Sess. (1955); comments of Sen. Malone, 101 Cong. Rec. 5396-5418, 5540-62.

[51] *See, e.g.*, comments of Rep. Wright of Texas and Sen. Humphrey of Minnesota, *supra*, at note 51.

> I see nothing in the legislative history which suggests any broader interpretation. . . . On the contrary, since the broader view . . . would have represented a controversial policy choice, *I think that the very lack of debate over this provision of the Act and the ease with which it passed compel the more limited interpretation.* (Emphasis supplied.)

2. The Legislative History Of § 1862(b) Negates Any Implication Of A License Fee Power Under That Section.

Representative Mills, a member of the Conference Committee at the time of the enactment of § 1862(b), has described the intent of Congress as follows:

> *We never intended any such use of tariff adjustments.* Whenever an industry essential to national defense was being impaired by imports *we intended that that injury be eliminated immediately in the interest of national defense through the use of a quota*. . . . 116 Cong. Rec. 37848 (emphasis supplied).

In their pursuit of limitless executive powers, petitioners profess to find support in the legislative history, citing several statements of individual Congressmen made during debate.[52]

[52] Petitioners, it should be noted, take a position here in fundamental disagreement with even the dissent in the court of appeals. The most that Judge Robb could say for the petitioners' argument on this point was that "the legislative history of Section 232 [19 U.S.C. 1862(b)] is hopelessly ambiguous and inconclusive" (Pet. App. 31a).

These statements are isolated and atypical. In some instances they are lifted out of a context which clearly supports the opposite interpretation. The proper characterization of legislative intent is that expressed by Representative Mills.

The legislative history of § 1862(b) shows that, at the time of its enactment in 1955, it was perceived only as a provision for quotas. Upon three occasions in subsequent years, Congress rejected proposed amendments to § 1862(b) which would have authorized the imposition of tariffs. On one occasion, in response to the published suggestion to the contrary by a cabinet task force, committee reports of both Houses of Congress specifically declared that § 1862(b) did not authorize the presidential imposition or increase of duties or fees. Since the issuance of Procs. 4210 and 4341, Congress has consistently sought to negate such presidential impositions.

a. THE TRADE AGREEMENTS EXTENSION ACT OF 1955.

Section 1862(b) originated in 1955 as a Senate amendment to a House bill (H.R. 1)[63] extending for three years the Presi-

[63] The national security provision was one of two controversial amendments added by the Senate Finance Committee to H.R. 1 (§§ 6 and 7 of H.R. 1 as reported by the Senate Committee). The other major amendment was a substantial rewording of the existing "escape clause" provision, the purpose of which was to lessen the burden of proof to be satisfied by domestic industries seeking relief for injuries suffered as a result of trade agreement concessions. Under the escape clause, an affected domestic industry could bring its case before the Tariff Commission and, upon a finding of injury by the Commission, the President was authorized to grant relief in the form of quotas and/or specified tariff adjustments. Hence, § 1862(b) was introduced in conjunction with a contrasting amendment which granted in express terms a tariff adjustment power to the President. In the Congressional debate over H.R. 1, these two amendments were frequently discussed together. This is not surprising in view of the fact that the application of the two provisions to suffering domestic industries overlapped. However, as a result, Congressmen speaking of the aid which would be available under the proposed amendments frequently did not distinguish between the two provisions.

See Senate Report No. 232, 84th Cong., 1st Sess. (1955); introductory comments of Senator Byrd, 101 Cong. Rec. 5292 *et seq.*; explanatory comments of Rep. Cooper, Chairman of the House Ways and Means Committee, in presenting H.R. 1 with the Senate amendments in the House, 101 Cong. Rec. 8159 *et seq.*

The escape clause was first added to the Trade Agreements Act in 1951 (65 Stat. 73; 19 U.S.C. 1363-1364). It was amended in 1955, 69 Stat. 166; in 1958 by the addition of a power to impose new tariffs up to 50% *ad valorem*, 72 Stat. 676; in 1962 by incorporation in the new "adjustment assistance" program, P.L. 87-794, 76 Stat. 882, 899, replacing 19 U.S.C. 1363-1364 with 19 U.S.C. 1901-1902, 1981; and again in 1974, P.L. 93-618, Title II, § 201, 88 Stat. 2011-2018, 2072, replacing 19 U.S.C. 1901-1902, 1981 with 19 U.S.C. 2251-2253.

[64] Kellam, *Regulation of Oil Imports*, 1961 Duke L. Rev. 175, 187 (1961); *The Oil Import Question*, Cabinet Task Force on Oil Import Control (1970), p. 3.

[65] The Advisory Committee recommendation is set forth at S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955), and is referred to throughout the House and Senate proceedings.

dent's authority to enter into foreign trade agreements under the Trade Agreements Act of 1934. The major impetus for the new national security provision in 1955 was the concern in certain quarters over the growing percentage of domestic oil consumption supplied by foreign imports.[64]

In 1954, President Eisenhower established an Advisory Committee on Energy Supplies and Resources Policy. Shortly before the Senate Finance Committee began hearings on H.R. 1, the White House issued a report of the Advisory Committee calling for a voluntary program to reduce oil imports to maintain the 1954 ratio of oil imports to domestic production.[65]

The Senate Finance Committee Report

During the Senate Finance Committee hearings on H.R. 1 Senator Neely of West Virginia introduced an amendment which would have restricted oil imports to 10 per cent of the total domestic petroleum demand.[66] Other proposed amendments would have placed quotas on other specific commodities, such as fluorspar, lead and zinc.[67] The Senate Finance Committee Report explains that the Committee chose the broad language of § 1862(b) in order to avoid multiple amendments setting quantitative import levels for a variety of national defense industries.[68] The general amendment was adopted to provide for flexible and open-ended application of quotas to an undetermined number of products crucial to the national security.

[66] Hearings on Trade Agreements Extension Act before the Senate Committee on Finance, 84th Cong., 1st Sess. 1032-1033 (1955) (hereafter Senate Hearings). Petitioners quote a statement of Senator Martin of Pennsylvania made during these hearings to the effect that the Neely Amendment would authorize the President to increase duties, and suggest that "it is fair to infer that [§ 1862(b)] was also so intended" (Pet. Br. 34-36). However, Senator Martin's remarks were never expressed in the statutory language, in a committee report, or communicated to the other Senators in debate. Statements by other co-sponsors of the Neely Amendment indicate a contrary understanding of the proposal as strictly a quota provision. *See* 101 Cong. Rec. 5538, 5593 (comments of Senator Monroney); Senate Hearings, p. 1272 (comments of Senator Daniel).

[67] S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). *See, e.g.*, 101 Cong. Rec. 5299 (comments of Senator Millikin); 101 Cong. Rec. 5298 (comments of Senator Barkley). Similar proposals were advanced in the House. *See* Hearings on Trade Agreements Extension Act before the House Committee on Ways and Means, 84th Cong., 1st Sess. (1955); "Minority Views," H.R. Rep. No. 50, 84th Cong., 1st Sess. (1955); 101 Cong. Rec. 1791-2 (remarks of Rep. Mills).

[68] "The committee had before it several proposals dealing with specific commodities, namely petroleum, fluorspar, lead and zinc. In lieu of specific action on each of these the committee adopted an amendment which specifies that the Director of the Office of Defense Mobilization shall report to the President when he has reason to believe that imports of a commodity are entering the United States in such quantities as to threaten to impair the national security . . . the President, if he finds a threat to the national security exists, shall take whatever action is necessary to adjust imports to a level that will not threaten to impair the national security." S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955).

The Finance Committee Report also indicated a strong preference for the method endorsed by the President's Advisory Committee, *i.e.*, informal presidential action aimed at securing voluntary import reduction, rather than mandatory controls.[69] Since a voluntary program must perforce be a quota program, the Report indicates a clear focus upon a quota, not a tariff, program. There is no indication in the Senate Report that the national security amendment was intended to enlarge the power of the President to adjust duties, nor any indication of an intention to provide a new power to levy massive fees.

The comments on the floor by Senator Carlson of Kansas, a member of the Finance Committee, reemphasized that the broad language of § 1862(b) was settled upon with this intention:

> During the executive sessions much consideration was given to the limitation of oil imports and the limitation of other imports on a percentage or quota basis. After literal-

[69] "[T]he committee concludes that in the interest of national defense imports should be kept [at 1954 proportions]. It is highly desirable that this be done by ***voluntary, individual action*** of those who are importing or those who become importers of crude or residual oil. The committee believes that every effort should be made and will be made to avoid the necessity of governmental intervention.

"The committee recommends, however, that if in the future the imports of crude oil and residual fuel oils exceed significantly the respective proportions that such imported oils bore to domestic products of crude oil in 1954, appropriate action should be taken." S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955) (emphasis added).

ly days of discussion and thought, the committee wrote in a general amendment dealing with these commodities. There can be no doubt in my mind as to the intent of the committee, nor, do I believe, as to the intent of the Senate in regard to limiting the oil imports to the average daily imports of the year 1954. . . .

[I]nsofar as the junior Senator from Kansas is concerned, this colloquy at least interprets the congressional intent, including the intent of the Finance Committee, as I interpret it, as a result of my attendance at the hearings — and I attended most of them. . . . [D]uring the hearings, when we had before us some of the presidents of and other witnesses representing the larger importing companies, I brought out the fact that I did not like to have imports limited by means of a rigid *percentage* basis, and that I hoped they would ***voluntarily make an effort to hold the imports within the limits*** set forth in the advisory committee's reports. 101 Cong. Rec. 5389, 5391 (emphasis added).

Senator Barkley of Kentucky, another member of the Senate Finance Committee, gives a similar account of the reasons for the general language of the national security provision:

> I may say that the [national security provision] . . . was adopted by the committee in lieu of a number of amendments dealing with special commodities which affect all the States — mine especially. . . . Instead of adopting an amendment dealing with the separate commodities, each being dealt with in a separate amendment, and instead of undertaking to *impose quotas* the whole

subject was left to the discretion of the President, based upon recommendations by the Director of Defense Mobilization as to whether any of the commodities were essential to the national defense. . . . If the President finds they are, he can *impose such quotas* or take such other steps as he may believe to be desirable in order to maintain the national security.[70] Many Senators felt impelled by local situations and their own obligations to support individual amendments calling for *reservations, exemptions or quotas* for particular products. However, the amendment approved by the committee was voted for by an overwhelming majority of the committee, in lieu of the other amendments. 101 Cong. Rec. 5298 (emphasis supplied).

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[70] Petitioners argue that the use of the disjunctive by Senator Barkley ("impose such quotas or take such other steps . . .") implies that the Senator envisioned the provision as including a tariff power (Pet. Br. 37-39). Petitioners ignore the logic of the grammar, as well as the related legal rule of construction of *ejusdem generis*:

> Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. 2A Sutherland, *Statutory Construction* 103 (1973). *See also Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 734 (1973).

The context of Senator Barkley's remarks indicates that the "other steps" to which he referred were other quantitative restrictions similar to quotas, *e.g.*, the "reservations, exemptions or quotas" referred to in the sentence immediately following.

The Conference Committee Report

The Report of the Conference Committee, which agreed to the Senate amendment to the House bill, added a comment relating the provision to other laws, which is crucial to understanding the broad language of the provision:

> In connection with amendment No. 29 [the national security provision] it is the understanding of all the conferees, both House and Senate, that it is not intended to, and does not, diminish or impair any authority the President may have under other laws. For example, it was emphasized that if the President sees fit to stockpile critical materials under any other law, that action may be taken wholly aside from the authority contained in this amendment. Conf. Rep. No. 745, 84th Cong., 1st Sess. 6 (1955).

The comment supports the argument of the respondents that § 1862(b) authorizes only the presidential imposition of direct import restrictions or quotas and that any other presidential action to restrict indirectly such imports is authorized only pursuant to powers and limitations delegated under other laws.[71]

[71] Such indirect import-restricting powers would include the power to stockpile under 50 U.S.C. 98, as well as the presidential powers granted elsewhere in the Trade Agreements Acts, such as the power to make certain tariff adjustments (19 U.S.C. 1336, 1338, 1351), to enter into special trade agreements with foreign countries (19 U.S.C. 1351) and to take action under the escape clause (19 U.S.C. 1363-64). *See* discussion *supra* at n. 63. These are among the tools at the President's disposal when an investigation and report under § 1862(b) mandate action to restrict imports.

Although the natural tendency of governmental stockpiling *per se* is to increase demand for a product and thereby increase imports, Senator Bennett, in the context of remarks on the Senate floor, pointed out that stockpiling *in conjunction with* the new national security amendment can provide a tool for restricting imports. He suggested that, by limiting stockpile purchases to domestic production or threatening to do so, the President has a "potent weapon" to secure voluntary export restrictions from foreign countries. 101 Cong. Rec. 5587.

The petitioners' argument that § 1862(b) by itself authorizes any presidential action which indirectly adjusts imports threatening the national security clearly makes superfluous the Conference Committee's comments, for it leaves no presidential action outside the scope of § 1862(b) to be diminished or impaired thereby.[72]

The court of appeals observed that committee reports are generally accorded greater weight than individual statements by legislators (Pet. App. 18a). *See also*, *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969). Accordingly, petitioners' argument was rejected as inconsistent with the Conference Committee Report.

[72] Petitioners claim that this statement in the conference report "was intended only to emphasize that the President would retain his authority, even in the absence of a threat to the national security, 'to stockpile critical materials under any other law'" (Pet. Br. 41, n. 29). Petitioners' interpretation is plainly contradictory to the specific example given by the Conference Committee. The Strategic and Critical Material Stock Piling Act (50 U.S.C. 98 *et seq.*) is a national security program designed to anticipate and prevent shortages of "strategic and critical materials . . . to supply the industrial, military and naval needs of the country for common defense." 50 U.S.C. 98.

Representative Cooper, Chairman of the Committee on Ways and Means, introducing the Conference bill to the House, singled out the same passage of the Conference Report as an important clue to construction. 101 Cong. Rec. 8160. Representative Cooper paraphrased the Conference Report to say that the President, in responding to a national security threat posed by imports, might rely upon *alternative statutory authority* such as stockpiling.

These comments of Congressman Cooper plainly do not, as petitioners claim, represent a "similar explanation" to theirs that the President retains powers "in the absence of a threat to national security" (Pet. Br. 41, n. 29). A later statement of Representative Cooper quoted by petitioners, that "[t]he President will enjoy full and unimpaired power in the administration of the [the national security] amendment," 101 Cong. Rec. 8161, contains no implication as to the actions authorized.

The Floor Debate

To the degree that individual comments of congressmen are relevant elements of legislative history, a review of the debate over H.R. 1 confirms that the Congress considered § 1862(b) a quota provision. In the initial House debate upon H.R. 1,[73] there is common reference to proposed amendments to impose a *quota on the importation of oil.*[74] There is not a single mention of presidential power to impose new or increased tariffs or fees to reduce imports of oil. The only allusions to a presidential tariff adjustment or fee power were made in express reference to either § 22 of the Agricultural Adjustment Act[75] or the escape clause.[76] The following remarks of Representative Mills, in a statement closing the debate on behalf of the Committee, reflects the understanding of the House members:

> The committee heard about a dozen representatives of the domestic petroleum-producing industry. They opposed H.R. 1 and urged the committee to impose a *quota on crude-oil imports.* . . .
>
> Then we heard the coal people tell us, "If you will put a *quota on the importation of residual oil* and deprive

[73] 101 Cong. Rec. 1661-91, 1727-96. Although § 1862(b) originated as a Senate Committee amendment to H.R. 1, the earlier House debate gives the background against which the House construed the Senate amendment when presented by the Conference Committee for House approval.

[74] Rep. Flood of Pa., 101 Cong. Rec. 1668; Rep. Perkins of Ky., 101 Cong. Rec. 1671; Rep. Poff of Va., 101 Cong. Rec. 1675; Rep. McCormack of Mass., 101 Cong. Rec. 1676; Rep. Bailey of W. Va., 101 Cong. Rec. 1679; Rep. Van Zandt of Pa., 101 Cong. Rec. 1758; Rep. Boggs of La., 101 Cong. Rec. 1768; Rep. Simpson of Pa., 101 Cong. Rec. 1790; Rep. Mills of Ark., 101 Cong. Rec. 1792.

[75] 101 Cong. Rec. 1774.

[76] 101 Cong. Rec. 1668, 1774, 1775, 1777-8, 1794.

> the people on the Atlantic Coast of enough residual oil to permit us to produce 11 million more tons of coal, it will go a long way toward a solution of the problems which we have." . . .
>
> I have been told that the coal industry has not found a way to go to the Tariff Commission to make a case under the escape clause. I have been told that by people in the coal industry. The only thing you could put in this bill that would have done one scintilla of good, if even that, would have been an *import quota on residual oil*. . . . The Department of Defense has always said that the importation of crude oil is necessary in the national interest. 101 Cong. Rec. 1791-92 (emphasis added).

The following statements made on the floor of the Senate are typical of the continuous discussion of the national security provision in the Senate debate:

> SENATOR MALONE [a member of the Finance Committee]: Mr. President, an amendment to H.R. 1 was accepted, in the Senate Finance Committee, providing that if the Office of Defense Mobilization, which Mr. Flemming heads, reports to the President that imports are endangering the security of the Nation, the President may investigate, and if he finds as a fact that the security is endangered, then he may *arrange quotas or safeguards.* 101 Cong. Rec. 5311 (emphasis added).

> SENATOR MONRONEY: I am glad that the committee included in its amendments a provision giving the President the right, after investigation, *to use quotas* for such

importations when he finds that such imports threaten to impair the national security. 101 Cong. Rec. 5538 (emphasis added).

SENATOR HUMPHREY: It is not my purpose this afternoon to discuss all the committee amendments, but I wish to comment on the amendment that was reached as a compromise — the Byrd-Millikin compromise. This amendment *gives the President authority to place import quotas* on any articles that threaten to impair the national security. . . . The provision as it stands would place *a quota* on any import that threatens to impair national security. 101 Cong. Rec. 5572 (emphasis added.)

SENATOR DOUGLAS: I notice that there has been written into the bill an amendment which gives to the Office of Defense Mobilization and the President the *power to impose quotas*. If Senators are opposed to the delegation of authority to reduce tariffs, why are they in favor of giving to the President the power to impose quotas? I ask for consistency from my friends. . . .

The last paragraph gives the Office of Defense Mobilization the power to recommend to the President and *gives the President the power to put import quotas into effect*. I suspect that certain Members believe they have received assurances that if they will vote for this bill, *an import quota* will be imposed on oil or that, at the very least, the imports will be frozen at the existing percentage, if not reduced to 10 per cent as I understand the Senator from West Virginia desires. 101 Cong. Rec. 5582, 5584 (emphasis added).

SENATOR MONRONEY: In reaching for a solution, the committee — and I wish to compliment the committee on what it has done — has attempted to provide that our domestic industries should be allowed to ask for the *imposition of quotas when imports endanger our security*. Thus, under the committee amendment the President would have the *right to impose quotas* if he found that the imports were damaging the security of the Nation.

On the other hand, under the former law [the existing escape clause] he could not do that; he could only impose tariffs or raise tariffs to relieve hardships.

We do not want a tariff on oil; we simply wish to share the market. . . . [T]he committee proposal merely gives the right to the President to *apply quotas*. 101 Cong. Rec. 5593 (emphasis added).

H.R. 1 as amended by the Finance Committee was presented to the Senate by Senator Byrd, as Chairman of the Committee. After presentation, Senator Byrd engaged in a number of explanatory colloquies, including the following:

> MR. SALTONSTALL: This is the final question I should like to address to the Senator. The problem of oil imports is taken care of in the last section of the bill. This gives the opportunity to the President *to adjust imports, under restrictive conditions or quotas*, after a report by the Director of Defense Mobilization, and after a separate, independent investigation by the President, if he believes the national security is being affected.
>
> MR. BYRD: That is correct, except the amendment applies to all commodities; it applies not only to oil, but to all commodities.

MR. SALTONSTALL: It applies to all commodities does it?

MR. BYRD: Yes. In other words, it *puts other commodities on the same basis as agricultural commodities.* It simply leaves to the President the power, in his discretion, to decide whether *to impose a quota or to reduce the imports.* 101 Cong. Rec. 5297 (emphasis added).

The court of appeals cited the above colloquy as demonstrating that "the intended scope of the action was limited to direct controls" (Pet. App. 16a).[77]

Petitioners suggest that Senator Byrd's reference to "agricultural commodities" implies that § 1862(b) authorized the

[77] Petitioners dispute this finding, asserting that "[t]he use of the disjunction — 'to impose a quota *or* to reduce the imports' — 'suggests that [Senator Byrd] did not consider the quota power to be the only power that was being delegated'" (Pet. Br. 39). The plain implication of Senator Byrd's words is that the President is authorized to impose quotas or take other action of the same genus, *i.e.*, quantitative restrictions. This interpretation accords with common usage, the customary rule of legal construction, and the context. See note 70, *supra*. The Senate Report, adopting the suggestion of the President's Advisory Committee, recommended that the President in the first instance exert *informal pressures* to secure *voluntary restraints* upon the importation of oil. In a discussion immediately preceding the colloquy with Senator Saltonstall, Senator Byrd cited an analogous situation where the President had avoided imposing an agricultural quota under § 22 of the Agricultural Adjustment Act by securing voluntary export restrictions from Argentina and Paraguay. 101 Cong. Rec. 5296. In his colloquy with Senator Saltonstall, Senator Byrd was quite clearly referring to voluntary restraints in using the term "reduce the imports." Senator Saltonstall speaks in terms of "restrictive conditions or quotas," while Senator Byrd refers to the decision to "impose a quota or reduce the imports." The type of non-quota "restrictive condition" which might "reduce the imports" would be the imposition of criteria for imported articles, such as a requirement that imported oil be of low-sulfur content, or that imported tomatoes be of a certain minimum size.

President to impose fees such as those authorized by § 22 of the Agricultural Adjustment Act, 7 U.S.C. 624 (Pet. Br. 38-39).[78]

However, the context in which Senator Byrd refers to the provisions of the Agricultural Adjustment Act clearly indicates that he was referring to agricultural quotas rather than fees. In a colloquy immediately preceding that with Senator Saltonstall, Senator Byrd engaged with Senator Thye of Minnesota in a discussion of the import protection available to prevent injury to domestic agriculture. The following comments were made:

MR. BYRD: [T]he President, upon investigation, can impose *quotas on agricultural products* under section 22 of the Agricultural Adjustment Act.

MR. THYE: The President may do so. . . . Can the President impose *an embargo*, and then have an investigation made?

MR. BYRD: The President can impose *quotas as he deems wise.* I shall read to the Senator a list of articles on which *quotas* have been imposed by the Department of Agriculture. The existing law now provides that on

[78] The comparison between § 22 of the Agricultural Adjustment Act and the national security provision, however, supports the narrow construction of the latter. Section 22, like the escape clause, exemplifies the orthodox Congressional practice of delegating tariff adjustment power to the President only by express terms and within specified limitations. Under § 22, upon an investigation, finding and report by the Tariff Commission of imports of agricultural products in quantities threatening to undermine programs of domestic agricultural regulation, the President "shall by proclamation impose such fees *not in excess of 50 per centum ad valorem* or such quantitative limitations . . . as he finds . . . necessary" to prevent interference with said domestic programs. It is telling that petitioners, in citing § 22 of the Agricultural Adjustment Act, omit the limiting language emphasized above (Pet. Br. 39).

> agricultural products, the President has a right to impose *quotas* after an investigation has been made. He has taken such action in a number of cases. 101 Cong. Rec. 5296 (emphasis added).

There is no mention in the interchange with Senator Thye of the imposition of fees on agricultural imports. Hence, the context of Senator Byrd's comment to Senator Saltonstall makes clear that Senator Byrd was referring to agricultural *quotas* only.

Petitioners make much of isolated statements by Senators Millikin and Bennett in the 1955 debate. These statements, petitioners assert, speak of the President exercising indirect import restrictions as well as direct restrictions or quotas.[79] Both statements are ambiguous on the crucial interpretive issue of whether they are directed solely to the national security amendment or to both of the substantial Senate Committee amendments, the strengthened escape clause and the national security provision.

The statement of Senator Bennett clearly does not refer to § 1862(b) alone:

> As I understand *the bill*, the ODM [Office of Defense Mobilization] will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling and any other variation of these programs in order to protect a particular industry and to meet its particular needs. 101 Cong. Rec. 5588 (emphasis added).

[79] The court of appeals expressed the customary rule in stating its "normal reluctance to attach overriding weight to statements of individual legislators during floor debates" (Pet. App. 18a).

As the court of appeals concluded, the statement "clearly was made in reference to the entire bill and other existing laws" (Pet. App. 17a). The authority to stockpile is in fact nowhere authorized within the Trade Agreements Extension Act.[80] Senator Bennett's statement is thus a repetition of the Conference Committee's observation that the President retains broad powers under other provisions of the trade acts and under other laws.

The statement of Senator Millikin, expressed in a colloquy with Senator Daniel of Texas, is to the same effect:

> It grants to the President authority to take whatever action he deems necessary to adjust imports if they should threaten to impair the national security. He may use tariffs, quotas, import taxes or other methods of import restriction. 101 Cong. Rec. 5299.

It is unclear whether, in the second sentence quoted above, the Senator is referring to powers under the national security provision alone or under the several "avenues" by which the President may take action to protect domestic industry.[81] The statement can be construed to say that, upon a finding of imports threatening to impair the national security, the President can impose a quota under the national security provision, and in addition can take such other action to resolve the problem as is authorized under other laws. In other words, in mandating action by the President "to adjust the imports" of products

[80] *See* 50 U.S.C. 98 *et seq.*

[81] In the same possession of the floor, Senator Millikin referred to the escape clause and the national security amendments as "two avenues," and stated that "neither is exclusive. All remedies available before these remedies were proposed will be available afterward, particularly those which focus on defense industries." 101 Cong. Rec. 5302.

threatening to impair the national security, Congress may assume that the President will also bring such other powers as he has to bear on the problem.

On the subsequent day of debate on the bill, Senator Douglas, the chief Congressional champion of free trade, engaged in an interchange with Senator Millikin. Senator Douglas explicitly directed his comments to the remarks of Senator Millikin upon which petitioners rely and nonetheless characterized the amendment as simply "giv[ing] the President the power to put import quotas into effect."[81] Senator Millikin did not challenge Senator Douglas' understanding of the scope of presidential authorization, although he did challenge other aspects of Douglas' understanding of his earlier remarks. 101 Cong. Rec. 5584. Senator Millikin's failure to contest Senator Douglas' characterization of the national security provision is inexplicable if, as petitioners suggest, his earlier remarks envisioned a sweeping grant of the tariff power.[83]

[81] SENATOR DOUGLAS: "The last paragraph gives the Office of Defense Mobilization the power to recommend to the President and *gives the President the power to put import quotas into effect*. I suspect that certain Members believe they have received assurances that if they will vote for this bill, an import quota will be imposed on oil or that, at the very least, the imports will be frozen at the existing percentage, if not reduced to 10 percent, as I understand the Senator from West Virginia desires.

"What has happened in the case of fluorspar, lead and zinc, I do not know. But *the Senator from Colorado* [Mr. Millikin], with his beaming benevolence which reassures all of us, *said on Monday* that he thought these industries would be adequately taken care of, and I think those who have looked into his benevolent face have concluded that oil, coal, fluorspar, zinc and lead *will have quotas imposed* upon them." 101 Cong. Rec. 5584 (emphasis added).

[83] There appears to be some question of the accuracy of the record of Senator Milliken's remarks. On the subsequent day of Senate debate, Senator Daniel asked Senator Millikin to repeat a portion of their colloquy immediately preceding the passage cited by petitioners, because Senator Daniel had found the printed record did not agree with his recollection:

The court of appeals found Senator Millikin's statement to be "a woefully slender reed" to support the petitioners' contention (Pet. App. 19a), in light of his "somewhat self-serving posture" as a representative of a state with considerable economic interest in the proposal.[84] The court also found Senator Millikin's statement to be contradicted by explicit statements of Senator Byrd, then Chairman of the Finance Committee (Pet. App. 19a), and by the Conference Committee Report, and to be "inconsistent with all the other legislative history recounted above" (Pet. App. 18a).

Representative Cooper, Chairman of the Committee on Ways and Means, reported the Conference bill to the House with strongly expressed reservations. 101 Cong. Rec. 8159 *et seq*. The comments of Representative Cooper focused upon the twin Senate amendments, the strengthened escape clause and the national security provision, and discussed the two

MR. DANIEL: "Mr. President, on Monday of this week, the distinguished senior Senator from Colorado [Mr. Millikin] was kind enough to answer several questions put to him by me. I appreciate his courtesy. However, I noticed that the Record, as printed, shows an answer to my last question which I did not understand to have been given, and which I do not believe the senior Senator from Colorado intended." 101 Cong. Rec. 5565.

[84] Pet. App. 17a-18a. *See also*, 101 Cong. Rec. 5922, as follows:

> SENATOR MILLIKIN: The amendment which the Senator from Texas and I have been discussing has been accepted by the administration. It has been approved by Senators from States where the protection of items essential to the national security is large and important.
>
> Colorado has coal and petroleum; it is a very important supplier of lead and zinc; and it is one of the few States producing fluorspar. Not many States have a greater interest in the effect of this amendment than the great State which it is my good fortune in part to represent.
>
> It is of considerable importance to me that this amendment provide an adequate vehicle for assistance to industries whenever imports threaten to impair their ability to supply the commodities needed for national defense or security.

together as interrelated, as was the pattern in Senate debate. It is illuminating that Mr. Cooper saw the strengthened escape clause as the more "damaging" measure:

> The two most ominous amendments adopted by the Senate are those relating to the escape clause and the peril point, and the so-called national security amendment. . . . Of these the most damaging in my opinion, was the amendment to the escape clause. 101 Cong. Rec. 8159.

Petitioners' construction of the national security provision would encompass the escape clause powers to impose quotas and to grant tariff relief without the limitation on tariff adjustments specified therein. Mr. Cooper's characterization of the escape clause as the more damaging of the two amendments clearly shows that he did not conceive the national security amendment to grant without limitation all the sweeping presidential powers claimed by the petitioners.[85]

[85] Petitioners claim that Rep. Cooper implies "an understanding that the President would not be limited to quantitative import restrictions" (Pet. Br. 40). The statement cited is ambiguous. It is concerned not with the reduction of imports under § 1862(b), but with a "a curtailment of *exports* by the United States." 101 Cong. Rec. 8161 (emphasis added). Cooper's own language does not suggest, contrary to petitioners' assertion, that he was thinking of possible consequences of § 1862(b) alone. In context, Rep. Cooper was reiterating the free trade argument that the national security is best served by increased international economic cooperation and that "any decision" of the President (under the escape clause, § 1862(b), or other protectionist provision) will threaten that objective and bring economic retaliation.

It is inconceivable that a measure giving the President the power to impose unlimited tariffs on any commodity, upon a finding of national security without a hearing, could sail through Senate and House approval without the most heated and extensive resistance imaginable. That not one Senator or Representative raised his voice to oppose such an extensive grant of power leads to the conclusion that such power was not granted at all. Thus, a study of the 1955 Congressional proceedings leads inescapably to the conclusion stated by Representative Mills that, in enacting the national security provision, Congress "never intended any such use of tariff duty adjustments." 116 Cong. Rec. 37848.

b. THE TRADE AGREEMENTS EXTENSION ACT OF 1958.

The Trade Agreements Extension Act of 1958 reenacted § 1862(b) with only minor changes and added § 1862(c). A substitute bill for the national security provision was proposed on the floor of the House in 1958 by Representative Simpson of Pennsylvania. The substitute bill largely tracked the language of the Committee's national security provision, but would have authorized the President either (a) to increase the existing duty on imports threatening to impair the national security by not less than 50 per cent above the rate of July 1, 1934, or (b) to set a quota limitation. 104 Cong. Rec. 10877. The substitute bill was rejected. In conjunction with the original Congressional discussion of § 1862(b) as a quota provision, and its implementation up to 1958 in voluntary oil import quotas, this rejection of the Simpson Amendment implied both that the House did not believe § 1862(b) previously conferred a tariff power and that the House did not intend it to do so. It should be noted, moreover, that when in this substitute bill it was specifically proposed to grant the President a tariff adjustment power in the national security provision, the proposal followed the orthodox Congressional method, delegating such power only within clearly specified Congressional limitations.

Under the authority of the 1958 Act the President on March 10, 1959, by Proclamation 3279, imposed the Mandatory Oil Import Program. It established the quota system restricting the importation of oil products which remained in effect until 1973. From the enactment of § 1862(b) in 1955 until 1973, no action was taken under this section to restrict imports except in the form of the imposition of quotas. Such long-standing contemporaneous construction is instructive in ascertaining legislative intent:

> If the meaning of the statutory words was doubtful . . . contemporaneous and long-continued practical construction of the act on the part of those charged with its administration . . . is accepted unless there are cogent and persuasive reasons for rejecting it. *United States* v. *Shreveport Grain & Elev. Co.*, 287 U.S. 77, 84 (1932).

c. THE TRADE EXPANSION ACT OF 1962.

The Trade Expansion Act of 1962 undertook the most extensive revision of the reciprocal trade agreements power of the President since 1934. As a result, the Congressional debate was exceptionally lengthy even for the Trade Agreements Acts. The national security provision, however, was reenacted unchanged except for altering the name of the investigatory agency.[86]

The feature of the 1962 Congressional debate which is virtually conclusive of legislative intent is an amendment proposed by the Senate Finance Committee which failed to secure Congressional approval. The Senate Finance Committee reported the bill (H.R. 11970) to the Senate with a proposed new § 353 which, if it had been enacted into law, would have specifically delegated to the President precisely the power claimed in Procs. 4210 and 4341. The abortive § 353 read as follows:

> Notwithstanding any other provision of law, the President may, when he finds it in the national interest, proclaim with respect to any article imported into the United States —
>
> (1) the increase of any existing duty on such article to such rate as he finds necessary,

[86] P.L. 87-794.

(2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary,
(3) the imposition of such other import restriction as he finds necessary. 108 Cong. Rec. 19875.

The conclusion is inescapable that Congress, in rejecting proposed § 353, was indeed rejecting an authorization to levy new duties to restrict imports which threaten to impair the national security.

The comments of Senator Holland of Florida clearly indicate that § 353 was perceived as an unprecedented delegation of the tariff power:

> [S]ection 353 . . . is a very great departure from anything that the Congress has ever done before by way of granting power to the Executive in the field of trade. . . .
>
> In other words, in instances in which Congress had not found it to be necessary heretofore, the provision would allow the President to create a tariff.
>
> Such a broad grant of authority would be, to the Senator from Florida, without understanding of its limitations, such an obstruction and such a hurdle that I could not cross it in voting for the bill. 108 Cong. Rec. 19875.

The court of appeals considered the rejection of § 353 as an important index of legislative intent:

> Quite simply, the proposal explicitly gave the President the same authority he claims derives implicitly from section 1862(b). . . .
>
> Two conclusions, equally devastating to the Government's position, can be drawn. The fact that the proposal was introduced at all yields the inference the Congress believed that no other provision of the Act conferred that authority. [Citations omitted.] We also must conclude that Congress' eventual rejection of the provision indicates that it did not desire to confer this authority and discretion upon the President. (Pet. App. 20a-21a.)

Petitioners claim that since the rejected § 353 would have authorized both tariffs and quotas, the court's analysis "does not lead to a distinction between tariffs and quotas as a means of reducing imports" (Pet. Br. 46). This argument is without merit. Section 1862(b) was conceived as a quota statute and throughout the 1955 debate referred to as a quota amendment. Voluntary, then mandatory quotas on oil imports had been in effect under its authority since 1955. Obviously, therefore, the novel authorization in 1962 would have been the authorization of duties. Tariffs, not quotas, were rejected in 1962.[87]

[87] Petitioners attempt to distinguish the rejected § 353 from § 1862(b), on the basis that the former involved the "national interest," and the latter the "national security" (Pet. Br. 46). The distinction between "national interest" and "national security" is captious when considered in light of the expansive definition of "national security" in § 1862(c), which defines that term to encompass considerations of the economic and social welfare of the nation. A law review note cited by petitioners concedes, after suggesting this distinction:

> To be sure, this may be more of a verbal than a practical distinction, since courts have construed "national security" very broadly in other contexts. If a similar broad construction were applied to section 232(b), then its scope would be largely indistinguishable from the rejected proposal and this would seem to be contrary to legislative intent. Note, 90 Harv. L. Rev. 432, 436 (1975).

Senator Byrd, Chairman of the sponsoring Finance Committee, explained the rejection of § 353 to the Senate as follows:

> Section 353 proposed to give the President unlimited and undefined power to impose tariffs and quotas in any situation where he thought the Nation's interest required. After an affirmative finding by the Tariff Commission, the President already has authority to impose quotas and tariffs, but other sections of this legislation spell out the limitations upon this authority. The other thing that section 353 appeared to do was to let the President decide what was in the national interest *without setting out any standards*. The whole concept of our trade program is that through an orderly procedure, facts are presented and judgments are made upon those facts. While the facts may show some measure of injury, the President is not bound by the recommendation made to him by the Tariff Commission nor is the Congress bound by the decision made by the President. Each may look at the facts and reach a conclusion, and this conclusion involved a consideration of the national interest. Section 353 was a sword which could cut two ways: First, one problem was that there was no procedure prescribed for ascertaining the facts and second, the other problem was that the Congress did not retain the same opportunity for re-

> viewing as the other[88] sections of the bill provide. 108 Cong. Rec. 22182.

The rejection of § 353 manifests again in unmistakable fashion the intention of Congress not to grant the presidential powers petitioners imply in § 1862(b).

d. THE TRADE ACT OF 1970.

The authority of the President to negotiate foreign trade agreements pursuant to the Trade Expansion Act of 1962 expired June 30, 1967. At the request of the President for renewal of this authority, the House Ways and Means Committee exerted a major effort to report the Trade Act of 1970, H.R. 18970. Hearings were conducted from May 11 until June 25, 1970, and the Committee met in executive sessions for over a month.[89]

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[88] Petitioners suggest that Senator Byrd was contrasting the absence of standards and safeguards in the rejected § 353 with § 1862(b) (Pet. Br. 45, 46). In point of fact, Senator Byrd contrasted the rejected § 353 not to § 1862(b), which contained no tariff power, but to the escape clause (§§ 1901, 1981) which did. Procedurally, a presidential tariff adjustment under the escape clause required a prior investigation and finding by a legislative agency, the Tariff Commission, § 1901(b). The escape clause set forth specific standards for relevant injuries (§ 1901(b)(1)), for what constituted a "serious injury" to domestic industry (§ 1901(b)(a) and (c) (1)), and even what legal standard of causation governed (§ 1901(b)(3)). Finally, the escape clause provided for Congressional review and override of the President's decision by concurrent resolution. One can properly infer from Senator Byrd's remarks on the rejection of § 353 that, since such specific procedures and standards are not present in § 1862(b), no tariff power is granted therein.

[89] H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 2 (1970); Tariff and Trade Proposals, Hearings before the Committee on Ways and Means of the House of Representatives, 91st Cong., 2d Sess. (1970).

There was extensive discussion of the problem of increasing oil imports and whether the quota system for regulating imports should be replaced with a system of protective tariffs.[90] In February, 1970, a majority of the members of the Cabinet Task Force on Oil Import Control had published a report recommending the replacement of the oil quota system with a system of oil tariffs.[91] The Task Force Report stated, somewhat tentatively, that it believed the President had the power to increase tariffs on oil imports under the national security provision.[92]

Petitioners seek to construe the almost immediate response of Congress in the abortive Trade Act of 1970 as an attempt to "rescind" an authority previously granted (Pet. Br. 47). In fact, a closer look at the language of the 91st Congress compels the opposite view. The Trade Act of 1970, as reported by the House Committee on Ways and Means, as passed by the House, and as reported by the Senate Finance Committee, attached the following proviso to amend § 1862(b):

> Provided, however, that any adjustment of imports shall not be accomplished by the imposition or increase of any

[90] H.R. Rep. No. 91-1435, pp. 23-24; House Hearing, *op. cit.*, especially pp. 2170 *et seq.*

[91] *The Oil Import Question* (1970). Two members and one observer on the Task Force, the Secretaries of Interior and Commerce and the Chairman of the Federal Power Commission, strongly opposed the Report's recommendations and wrote a Separate Report. *Id.*, App. 343 *et seq.* In addition, three of the majority of five members voting for the Report voiced Supplementary Views expressing certain reservations. *Id.*, 131-133.

[92] "Although it may be unusual for the President to increase tariffs, this power is conferred by the statute which authorizes him to take whatever action he deems necessary on national-security grounds to 'adjust imports'." *The Oil Import Question* 90.

The Task Force Report does not cite any authority for this construction of § 1862(b).

> duty, or of any fee or charge having the effect of a duty. In the case of any investigation under this subsection initiated by request or application, the Director shall make and announce the determination required by this subsection not later than 1 year after the date on which such request or application was made. H.R. Rep. 91-1435, 119.

Representative Mills, introducing the bill as Committee Chairman, responded to a question concerning the Cabinet Task Force Report's recommendation as follows:

> I had something to do with the drafting of the national security provision back in the 1950's. . . . What is here in law now we worked out in that conference. *We never intended any such use of tariff duty adjustments.* Whenever an industry essential to national defense was being impaired by imports *we intended that the injury be eliminated* immediately in the interest of national defense *through the use of a quota*, which would do it. 116 Cong. Rec. 37848 (emphasis supplied).

The explanation of the proposed amendment to § 1862(b) given in H.R. Rep. No. 91-1435 made explicit that the new language prohibiting any presidential fee or duty under § 1862(b) was seen to be declaratory of the previous law. The Committee stated that the new language was added on the basis of a review of the legislative history of the section. The Committee went on to emphasize that the new language in no way lessened the existing authorization of the President to adjust imports threatening to impair the national security:

The bill would amend section 232 of the Trade Expansion Act of 1962, the "national security provision", to provide that any adjustment of imports under that section shall not be accomplished by the imposition or increase of any duty, or of any fee or charge having the effect of a duty. The committee has reviewed the legislative history of section 232 of the Trade Expansion Act and its predecessor provisions in the trade agreements legislation, and concludes that the delegation of authority to the President to adjust imports should be limited to the use of quantitative limitations.[93]

> The amendment to section 232 is not intended in any way to foreclose the President from adjusting imports to such levels as he deems necessary to prevent impairment to the national security. Nor does it affect the flexibility of the President to modify import limitations already imposed under section 232 to meet increased demands for raw materials or other emergency requirements which may arise from time to time. H.R. Rep. No. 91-1435, 23-24.

In short, the Committee was saying that the new language would not change the law but would assure its proper construction in response to a novel construction suggested by the executive branch.

[93] Petitioners quote only the last half of the second sentence quoted above—*i.e.*, eliminating the statement that the amendment represented the Committee's reading of the legislative history — in order to suggest that "one might infer that Congress believed the President *did* have the authority under Section 232(b) to adjust imports by the use of monetary exactions . . ." (Pet. Br. 47).

The Senate Finance Committee reported the bill with the same proposed proviso attached to § 1862(b). The Report of the Committee, S. Rep. No. 91-1431, like the House Report, explained that the new language is declaratory of the Committee's review of the legislative history of the section. The Senate Report further explained that there were practical reasons why the tariff approach had never been contemplated as a tool to meet the national security problem.[94] These 1970 committee reports and the related legislative history further establish that § 1862(b) authorizes only direct import restrictions.[95]

[94] "The committee has reviewed the legislative history of section 232 of the Trade Expansion Act and its predecessor provisions in the trade agreements legislation, and concludes that the delegation of authority to the President to adjust imports should be limited to the use of quantitative limitations.

"The amendment to section 232 is not intended in any way to foreclose the President from adjusting imports to such levels as he deems necessary to prevent impairment to the national security. Nor does it affect the flexibility of the President to modify import limitations already imposed under section 232 to meet increased demands for raw materials or other emergency requirements which may arise from time to time. If, under particular circumstances, not foreseen by your committee, the President believed that duties or tariffs would be a more appropriate remedy in a case he would be free to request such authority from the Congress." S. Rep. No. 91-1431, 251. Comments regarding practical reasons for exclusion of a tariff power are quoted *supra* at note 34.

[95] Petitioners assert that in rejecting the 1970 amendment the Senate "determined not to rescind" a preexisting tariff power (Pet. Br. 47). In fact, the entire Trade Act of 1970 was attached in the Senate as a rider to the Social Security Amendments of 1970 (H.R. 17550) late in the session in a desperate attempt to secure passage of the trade bill. *See* introductory comments of Senator Long, 116 Cong. Rec. 41798 *et seq*. In order to allow passage of the Social Security bill, the Senate voted to strip the bill of "all of the nongermane amendments" and recommitted the trade bill to committee. 116 Cong. Rec. 43645, 43646. Hence, the entire trade act and not the specific amendment was rejected.

e. THE TRADE ACT OF 1974.

Section 1862(b) was reenacted in the Trade Act of 1974 with amendments requiring a new procedure for public hearings and naming the Secretary of the Treasury as the investigatory agency. P.L. 93-618. It was enacted in the midst of the gravest crisis in international trade since the 1930's. Dramatic changes in the international oil market represented a major part of the crisis. Between the reporting of the Trade Act (H.R. 10710) to the House on October 10, 1973, and the reporting of the bill to the Senate, on November 26, 1974, the price of foreign oil had escalated from $3.00 per barrel to $13.00 per barrel.[96]

A major stated purpose of the Trade Act of 1974 was the assertion by Congress of its own constitutional responsibility for the laying of duties and the regulation of foreign commerce. A principal theme of the Congressional debate was that, al-

In any case, Congressional concern over the aberrant construction of § 1862(b) was mooted when President Nixon determined not to adopt the Cabinent Task Force recommendation. *See* Hearings and Informal Proceedings before the Committee on Finance, United States Senate, 91st Cong., 2d Sess., Amendments to Incorporate the Text of the Trade Act of 1970, pp. 279-92. *See also*, 116 Cong. Rec. 41807 (comments of Senator Long).

[96] S. Rep. No. 93-1298, 93d Cong., 2d Sess. 13. As a result of this development, the oil import fee system imposed by President Nixon in Proc. 4210, April 18, 1973, designed to equalize the price of cheap foreign oil, was made obsolescent before it was to come into full effect.

though the President needed new authority to respond to the international trade crisis, any delegations of power to the President by the Congress should be specific, limited, and subject to Congressional oversight.[97] Clearly Congress did not at this point intend to grant the President, under § 1862(b), the power to impose duties unlimited in amount, on any article of foreign commerce, without Congressional oversight or review.

Petitioners suggest that "[i]n view of the unsuccessful 1970 amendment and the President's subsequent assertion of authority to impose license fees" in 1973, the reenactment of § 1862(b) in the Trade Act of 1974 "can only be viewed as an acquiescence in the President's interpretation" (Pet. Br. 48).

As this Court said in *Zuber* v. *Allen*, 396 U.S. 168, 185, n. 21 (1969):

> Legislative silence is a poor beacon to follow in discerning the proper statutory route. . . .
>
> This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional ina tion frequently betokens unawareness,

[97] *Id.*, at 3, 14, 25. The report also stated:

> Article I, Section 8 of the Constitution vests in the Congress plenary authority to 'lay and collect taxes, duties, imposts' and to 'regulate commerce with foreign nations'. Since 1934, Congress has periodically delegated to the President *specific and limited authority* to conduct negotiations with other countries for reciprocal tariff and trade concessions. . . . The Finance Committee's amendments seek to establish appropriate and constitutionally-sound guidelines and criteria to govern the exercise of the authority granted by the bill. *Id.*, at 14. (emphasis added). *See also*, remarks of Rep. Burke in the House debate (119 Cong. Rec. 40533) and Senator Ribicoff in the Senate debate (120 Cong. Rec. 21380).

> preoccupation, or paralysis. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69. . . . Even less deference is due silence in the wake of *unsuccessful attempts to eliminate an offending interpretation by amendment*. (Emphasis supplied.)[88]

See also, *Helvering* v. *Hallock*, 309 U.S. 106, 119-121 (1940); *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 140-141, 143-144 (1941); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 560-561 (1944); *Cleveland* v. *United States*, 329 U.S. 14, 22 (1946); *New York* v. *Saper*, 336 U.S. 328, 334 (1949); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950).

Legislative acquiescence may have some validity where a long-standing administrative interpretation preceded Congressional reenactments. However, the first-tier fees were imposed by Proc. 4210 only five months prior to the reporting of the Trade Act of 1974 to the House. H.R. Rep. No. 93-571, 93d

[88] Since legislative silence in the face of contrary administrative *action* is an unreliable indicator of legislative intent, *a fortiori*, legislative silence in the face of equivocal *expressions* of administrative interpretation should be completely useless as an indicator of legislative intent. Yet petitioners cite an incidental opinion, recommending no action, hidden in a report in 1957 of the Office of Defense Mobilization to a subcommittee of the House Committee on Ways and Means, as probative of the intent of both Houses of Congress in 1958 (Pet. Br. 42, referring to Foreign Policy, Compendium of Papers on United States Foreign Policy, Collected by the Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means, p. 643 (1958)).

Similarly, petitioners cite a statement in 1955 of Gerald D. Morgan, Special Counsel to the President, expressing an interpretation of the statutory language (Pet. Br. 40). Moreover, the statement of Morgan begs the petitioners' question, for "action [in] . . . any form appropriate to the situation" would include only actions within the statutory authorization, *viz.* "action . . . to adjust the imports." 101 Cong. Rec. 8162.

Cong., 1st Sess. (October 10, 1973). As this Court observed in *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973):

> [Although the administrative] construction of the statute over an extended period should be given great weight . . . [t]his proposition . . . must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.

In *Saxbe* v. *Bustos*, 419 U.S. 65 (1974), relied upon by petitioners (Pet. Br. 48), five Justices of this Court upheld what they found to be a long-standing administrative construction from 1927 during which time Congress had reenacted legislation governing the subject matter a number of times. Four Justices in dissent found the relevant period of administrative practice to date only from 1952 and did not find clear evidence that Congress, in passing relevant legislation in 1965, addressed itself to the practice or intended approval. 419 U.S. at 86. Hence, one might infer from *Saxbe* v. *Bustos* that 47 years constitutes a long-standing administrative construction putting Congress on notice, but 22 years does not.[89]

In fact, Congress in passing the Trade Act of 1974 expressly indicated that it was postponing for separate legislation the complex national energy problem. In reporting the Trade Act in the House at the time of the oil embargo crisis of 1973, the House Committee on Ways and Means stated:

[89] *Compare Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731 (1975), which noted a long-standing and consistent judicial construction of nearly 20 years.

> It is the intention of the committee to return to this important problem of establishing a rational and equitable allocation of import energy resources. H.R. Rep. 93-571, 93d Cong., 1st Sess. 36 (1973).[100]

The Committee reported in May, 1974, its promised bill to deal with imported energy resources. H.R. 14462. The bill would have amended § 1862(b) to provide for the imposition on oil and oil products of duties or fees within the specific limits and subject to legislative veto by majority vote of either House. H.R. Rep. No. 93-1028, Part 2, pp. 24-25. Once more it is clear that when Congress contemplated delegating a tariff-adjustment authority to the President, it did so only in explicit terms, with specific limitations, and with provision for Congressional review.[101]

[100] Rep. Vanik, a member of the Committee on Ways and Means, explained as follows:

> A most serious, glaring problem in the bill is its failure to deal in any way with the energy and raw materials crisis. In short, the bill has been overtaken and rendered almost obsolete by the oil embargo. As Robert Gardner, law professor at Columbia University and a Deputy Assistant Secretary of State during the Kennedy administration said in his recent speech to the National Foreign Trade Convention: The Trade Bill "has the appearance of a Rip Van Winkle who has returned to the international trade arena after a long sleep unaware that the most serious current threat to the economy of our country and that of our allies is the withholding of oil by the Arab countries." 119 Cong. Rec. 40575.

[101] Petitioners claim that the proposed amendment of § 1862(b) by H.R. 14462 "would have acknowledged the President's authority under the existing provision to adjust imports by use of quantitative limitations, duties, taxes, or fees" (Pet. Br. 48, n. 37).

No such acknowledgement is stated in the language of the proposed amendment, H.R. Rep. No. 93-1028, Part 2, pp. 24-25, nor in the explanatory text of the Report. To the contrary, the Report specifically attempted to lay the foundation for a retroactive legislative censure of the President's action by providing that "actions under section 232 [§ 1862(b)] in effect as of the date of enactment of the bill . . . shall be treated as having been documented and delivered to the Congress on the date of enactment." H.R. Rep. No. 93-1028, Part I, p. 65. Thereby the President's prior action would have been subjected to the bill's provision for legislative veto by majority vote of one House.

In the hearings conducted by the Ways and Means Committee preparatory to H.R. 14462, Secretary of the Treasury George P. Shultz testified. Representative Vanik questioned him concerning Proc. 4210. The Secretary conceded that the fees were not in fact reducing the importation of oil. Rep. Vanik indicated astonishment that the fees could amount to over $1 million on the oil cargo of a single tanker and commented, "[T]his tremendous license fee . . . is an intrusion into the rights of this Congress to tax." "Windfall" or Excess Profits Tax Hearings before the Committee on Ways and Means, 93d Cong., 2d Sess. 170-171 (February 4-7, 1974).

f. CONGRESSIONAL ACTION SINCE PROC. 4341.

President Ford issued Proc. 4341 imposing the second tier of license fees on January 23, 1975. On January 30, 1975, the Committee on Ways and Means reported H.R. 1767, a bill "to suspend for a 90-day period the authority of the President under section 232 of the Trade Expansion Act of 1962" to increase tariffs upon oil and to negate the fees imposed in Proc. 4341. H.R. Rep. No. 94-1, 94th Cong., 1st Sess. 1. H.R. 1767 was passed by both houses of Congress, but vetoed by the President on March 4, 1975.

The Report of the Committee on Ways and Means stated that the President had disregarded in practical effect the procedural requirements of § 1862(b). *Id.*, 4-5, 14. The Report also stated that "the degree of import restraint gained by the precipitous Executive action under the umbrella of national security is of minimal contribution to the overall goal of reduction of oil imports." *Id.*, 11. The Report expressed greater concern, however, that the presidential action represented an

intrusion into a sphere of Congressional responsibility for programs of taxation and regulation of commerce:

> What is of more basic concern is the effect the Proclamation has on the authority of the Congress. . . . There is no doubt that to allow the President's proclamation of January 23, 1975, to stand pre-empts the choices that are otherwise available to the Congress in developing its own approach to energy conservation through the tax system. . . .
>
> The existing license fee system and the import fee system proclaimed January 23 establishes a separate taxing mechanism, defining taxable units and categories of goods, determining equities among taxpayers based on assumed special circumstances, and assigning revenue collection responsibilities. The whole revenue and tariff system established by the President is outside the tariff and customs law and the Internal Revenue Code, and none of the criteria and guidelines for administering the system has been approved by the Congress. *Id.*, 12, 17.

The Committee Report also specified that the bill did not constitute ratification of the fees imposed by either President Nixon or President Ford:

> No Court has had an opportunity to consider the reach of the delegation contained in the Trade Expansion Act and this resolution does not purport to do so now.
>
> There is certainly grave doubt, at least, that a Court would uphold a claim that the Congress attempted to delegate virtually unlimited power to impose fees, no matter what euphemism is selected to denominate them, as a means of restricting imports. In any event, however, we understand the scope of that delegation will soon be determined in a Court action. . . .
>
> Nor does the Resolution ratify any previous actions by any President made in reliance on the National Security provisions of the Trade Expansion Act to impose dollar fees on imports, no matter whether this was done by Proclamation or in any other way. H.R. Rep. No. 94-1, 15. *See also*, S. Rep. No. 94-11, 7.

In the Energy Policy and Conservation Act of 1975, P.L. 94-163, Congress reasserted legislative control in the area of a national energy policy. The enumerated purposes of the Act are "to provide for . . . reducing the impact of severe energy supply interruptions; to increase the supply of fossil fuels in the United States . . .; [and] to conserve energy supplies." Section 2. The Act delegated to the President powers to develop strategic petroleum reserves (§§ 151 *et seq.*), to impose contingency conservation programs including rationing (§§ 201 *et seq.*), and to participate in international energy programs (§§ 251 *et seq.*), all subject to Congressional review (§§ 159, 201(b)-(e), 251(b), 551, 552). The Act requires the President to promulgate rollback ceiling prices on crude oil, resulting in a weighted average sales price for crude of $7.66 per barrel, subject to upward adjustments of not to exceed 10 per cent *per annum* (§ 401(a)).[102]

[102] Congress expressed its antipathy to use by the President of a taxing power in respect to petroleum in a number of ways. The Act provides that any energy conservation contingency plan prescribed by the President to reduce energy consumption may not "impose rationing or any tax, tariff, or user fee" (§ 202(a)(a)) and that "no rationing contingency plan . . . may impose any tax . . . or any user fee" (§ 203(e)). Congress did authorize the President to submit a report on possible incentives to domestic producers importing oil in order to reduce the price of imports (§ 13(e)), but any price-increasing tariff power was conspicuously absent.

The President removed the supplementary license fees as soon as this Act was passed. Proc. 4412. However, the President retained the first-tier license fees. Unlike the second-tier fees, which were designed for a reduction of imports by 8 per cent, the lower first-tier fees became obsolete when the price of foreign oil rose by 400 per cent (A. 283). Secretary of the Treasury, George P. Shultz, testifying before a committee of Congress in 1974, frankly conceded that the first-tier fees were not reducing the importation of oil into the country. Rather, he stated:

> [T]he system is designed for a long-run situation in which it may very well be that prices in the United States are above world market prices, or to put it another way, world market prices come down. "Windfall" or Excess Profits Tax Hearings before the Committee on Ways and Means, 93d Cong., 2d Sess. 170-171 (February 4-7, 1974).

The first-tier fees, thus, have no perceptible effect on oil imports and are still being exacted pending the time when they might become useful to that end. In the upshot, the oil import fee program as presently in effect represents a *reductio ad absurdum* of the petitioners' contention that the oil import fees are properly imposed under the authorization of § 1862(b) "to adjust the imports."

Conclusion

The judgments of the court of appeals should be affirmed.

Respectfully submitted on behalf of plaintiff states and their governors.

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No. 75-382

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL ENERGY ADMINISTRATION, ET AL., PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-382

FEDERAL ENERGY ADMINISTRATION, ET AL., PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

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1. Respondents argue that Section 232(b) must be construed to foreclose "the imposition of fees or tariffs" (Br. 45) in order to avoid "a serious question of unconstitutional delegation of legislative power" (Br. 42). That "serious question" would arise, according to respondents, because the statutory standards governing the President's exercise of the authority conferred by Congress may be too "imprecise" (Br. 43) and too "broad" (Br. 44) to survive constitutional scrutiny.

Even if there were merit to respondents' delegation argument, it would not support their interpretation of Section 232(b). The statute itself draws no distinction between quotas and fees, and its standards are no more precise and no more confined with respect to either form of presidential action. If the delegation of authority

were constitutionally defective, the result would be that neither a quota *nor* a fee could properly be imposed by the President.

Respondents seek to avoid that result by arguing that "[t]he delegation doctrine as applied to the taxing power [in contrast to the commerce power] is particularly stringent" (Br. 44). We do not concede that Section 232 represents a delegation of the taxing power rather than the commerce power. See *Head Money Cases*, 112 U.S. 580, 595. But this Court has, in any event, already considered and rejected respondents' contention that Congress may not delegate its taxing power as freely as its commerce power.

In *Hampton & Co.* v. *United States*, 276 U.S. 394, the Court upheld the constitutionality of a provision authorizing the President to increase or decrease import duties imposed by the Tariff Act in order to equalize the differences between foreign and domestic production costs for similar articles. The petitioner, while conceding that Congress could properly delegate certain of its legislative powers to the President, argued that "this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties" (276 U.S. at 409). The Court responded, in language equally applicable to respondents' contention here, that "[t]he authorities make no such distinction" (*ibid.*). "The same principle that permits Congress to [delegate] * * * its rate making power in interstate commerce * * * justifies a similar provision for the fixing of customs duties on imported merchandise" (*ibid.*). In the exercise of either its commerce power or its taxing power, "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future

conditions, and it may leave the determination of such time to the decision of an Executive" (276 U.S. at 407). Congress may thus authorize the President "to vary the customs duties according to changing conditions" if it "shall lay down by legislative act an intelligible principle to which [the President] * * * is directed to conform" (*id.* at 409).

Section 232 satisfies that requirement. It establishes an intelligible precondition to the invocation of presidential authority—a finding that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. (Supp. IV) 1862(b). It limits the President's action to what "he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." *Ibid.* It identifies some of the "relevant factors" to be considered by the President in determining whether imports of an article threaten to impair the national security. 19 U.S.C. (Supp. IV) 1862(c). And it prescribes a detailed procedure to be followed prior to the exercise of the President's authority, a procedure designed to ensure that appropriate executive officers (and, in some circumstances, other interested parties) have an opportunity to comment on the need for presidential action. See 19 U.S.C. (Supp. IV) 1862(b).

This is not a case in which "the Congress has declared no policy, has established no standard, has laid down no rule." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 430. While the statutory standard here may be "difficult to [apply] with exactness," the standard "is perfectly clear and perfectly intelligible." *Hampton & Co.* v. *United States*, *supra*, 276 U.S. at 404. See also *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 104-105. Respondents do not

challenge the President's findings, under the governing standard, that imports of oil were threatening to impair the national security and that the license fee system would serve to eliminate that threat (see Pet. App. 10a, 39a).

As this Court has stated, "[t]he judicial approval accorded * * * 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems"; "[n]ecessity * * * fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules * * * ." *American Power & Light Co.* v. *Securities & Exchange Commission, supra,* 329 U.S. at 105. Particularly in the area of foreign affairs and national security, where the need for flexibility in responding quickly to changing conditions is accentuated, there is no constitutional objection to a delegation of legislative authority of the kind involved here. See, *e.g., United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319-322; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-110; *Lichter* v. *United States*, 334 U.S. 742, 782, 785.[1]

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[1]The *amicus curiae*, apparently disagreeing with respondents, argues that "[t]he question raised is not whether the standards for taking any prescribed action are properly delineated, but whether the power to prescribe the form of action itself can properly be delegated to the President" (Br. 39; emphasis omitted). But we know of nothing in the Constitution or the decisions of this Court—and the *amicus* cites nothing—to support the asserted distinction. If, as the *amicus* concedes, Congress may delegate to the President the authority, under "sufficiently comprehensible standards" (Br. 38), to determine *when* to take prescribed action, there is no reason why Congress should be barred from delegating the power, under similarly comprehensible standards, to determine what *form* the action should take to accomplish the prescribed legislative objective. See *American Power & Light Co.* v. *Securities & Exchange Commission, supra,* 329 U.S. at 106.

2. Respondents argue (Br. 47-49) that the license fee system adopted by the President violates Article I, Section 8, clause 1 of the Constitution, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." Respondents contend that the "first-tier" license fees are not uniform because the amount of petroleum that may be imported without prior payment of those fees varies among the geographical districts established by the proclamations (see A. 93-96, 103-104).

Although respondents characterize this contention as a reason for construing Section 232(b) to preclude altogether the imposition of license fees (Br. 49), the logic of their argument does not go so far. Respondents do not (and obviously could not) argue that *any* system of license fees would violate the uniformity clause of the Constitution. Nor do they complain of the *imposition* of the fees under the system adopted here. Their constitutional attack is directed to the allegedly discriminatory *exemptions* from those fees.

(a) That issue, in our view, is not properly presented in this Court. The court of appeals held that the authority conferred by Section 232(b) does not encompass the imposition of a system of license fees. Its judgments set aside the Federal Energy Administration's regulations "in accordance with the opinion of this Court" (Pet. App. 34a) and reversed the judgment of the district court and remanded "with instructions to enter appropriate relief for appellants" (Pet. App. 36a).

The nature of any further proceedings before the Federal Energy Administration, and the character of the "appropriate relief" to be entered for appellants in the district court, would be substantially altered if this Court were to rule, in line with respondents' present contention, that the license fee exemptions under the

existing system are impermissibly discriminatory. A ruling to that effect would warrant, at most, elimination of the present geographical differences in the exemptions. The court of appeals' judgments under review, by contrast, invalidate the entire license fee system.

Respondents' uniformity argument is therefore not an alternative ground for affirming the judgments below, because its acceptance would require revision of those judgments. Since respondents filed no cross-petition for a writ of certiorari, they may not now seek a modification of the judgments under review. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. See also Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

(b) Even if the issue were properly presented, and even if the oil import license fees were viewed as "Duties, Imposts [or] Excises" within the meaning of the uniformity clause (but see *Head Money Cases, supra*, 112 U.S. at 595-596),[2] respondents' argument would fail because there is no lack of uniformity in the imposition of the fees.

No contention is made that the *supplemental* fees which have been eliminated (see our main brief, pp. 12-

[2]Of course, if, as respondents' argument on this point implies, the license fees are to be treated as "Duties," respondents' sole remedy would be to file a protest pursuant to the Tariff Act of 1930, challenging the imposition of the fee as a duty chargeable on the importation of petroleum, and to seek review of any denial of such a protest in the Customs Court. See 19 U.S.C. 1514(a)(2), 28 U.S.C. 1582(a). See also, *e.g.*, *J. C. Penney Co.* v. *United States Treasury Department*, 439 F.2d 63 (C.A. 2), certiorari denied, 404 U.S. 869. We have not, however, taken the position that the license fees are "Duties."

14)—were discriminatory, for they were applicable to *all* imports of crude oil and petroleum derivatives. Respondents argue only that the "first-tier" or base fees are assessed in a discriminatory manner because the quantitative exemptions from those fees vary among geographical districts.

The current oil import control system is a hybrid, reflecting elements both of the former quota system and of the new import license fee system. The program adopted by President Nixon in 1973 was designed to accomplish "a gradual transition from the existing quota method of adjusting imports" to "a system of fees" to be paid by oil importers for licenses authorizing them to import specified amounts of petroleum and petroleum products (A. 92). It established a gradually increasing schedule of license fees, the so-called "first-tier" fees (A. 97), and gradually decreasing quotas of imports, to be reduced to zero by 1980, that would be exempt from the imposition of those fees (A. 93-96, 103-104). Those transitional quotas differ among geographical districts in a manner that reflects the geographical quotas that had been in effect prior to the adoption of the import license fee system.

The base fees are applied uniformly to all crude oil and petroleum products imported in excess of the transitional quotas. If there is any lack of uniformity, it is in the transitional quotas, not in the fees. But, as respondents concede, "a quota may discriminate among domestic users without fear of violating the uniformity clause of the Constitution" (Br. 28), for it is not a duty, an impost, or an excise within the meaning of that clause.

The geographical quotas, moreover, would not contravene the requirement of uniformity even if it applied. When President Eisenhower established the Mandatory Oil Import Program in 1959, he found that "within the

continental United States there are two areas, one, east of the Rocky Mountains * * *, in which there is substantial oil production capacity in excess of actual production, and the other, west of the Rocky Mountains * * *, in which production is declining and in which, due to the absence of any significant inter-area flow of oil, limited imports are necessary to meet demand" (A. 81). The President accordingly determined that "imports into such areas must be treated differently to avoid discouragement of and decrease in domestic oil production, exploration and development to the detriment of the national security" (A. 81-82).

The differing quotas initially imposed in 1959 and carried forward in the present transitional program thus reflect material historical differences in the characteristics of the regions themselves. As this Court has observed, "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159.

For the reasons stated above and in our main brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AMICUS CURIAE SUBMITTED BY McCLURE & TROTTER IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The law firm of McClure & Trotter hereby moves for leave to file the attached brief *amicus curiae* in support of Respondents pursuant to Rule 42(3) of the Rules of the Supreme Court. Respondents have consented to the filing of this brief and copies of such consents have been submitted to the Clerk of this Court. Petitioners have withheld their consent.

The firm represents several importers of crude oil and petroleum products which have a direct and substantial interest in the outcome of this case.

The brief *amicus curiae* complements Respondents' brief and will, we believe, be helpful to the Court in its consideration of this matter. In support of the argument that the import license fees in controversy violate the uniformity requirement of Article I, Section 8, Clause 1 of the Constitution, the brief *amicus curiae* explains in detail—not found in Respondents' brief—why the fees are not geographically uniform. In addition our analysis of the issue concerning the Constitutionally permissible scope of delegations of legislative powers differs considerably from that presented by Respondents. Finally, our approach to the interpretation of the statute (19 USC 1862(b)) presents pertinent legislative materials not included in Respondents' brief.

WHEREFORE, the law firm of McClure & Trotter requests that this Court grant leave to file the accompanying brief *amicus curiae* in support of the Respondents.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE SUBMITTED BY McCLURE & TROTTER IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The law firm of McClure & Trotter submits this Brief as an *amicus curiae* in support of Respondents. The firm represents several importers of crude oil and

petroleum products which have a direct and substantial interest in the outcome of this case. Because of its practice in the field of customs duties and foreign trade law, the firm recognizes the importance of this case and believes that its views in this matter might be helpful to the Court.

The submission of this brief is made under Rule 42(3) of the Rules of the Supreme Court of the United States.

I

SUMMARY OF ARGUMENT

Disputed Import License Fees Were Imposed Without Statutory Authority.

Section 232(b) of the Trade Expansion Act of 1962 contains no express delegation of power to the President to impose a duty, fee, or other exaction on imports. The statute contemplates action to ensure that the volume of imports of a particular article do not exceed a level determined by the President to be safe from the standpoint of national security. Because only direct or quantitative controls are capable of restricting the volume of imports to an exact pre-determined level, there is no palpable basis to find an implied delegation of power to impose duties or fees. The tenor of the legislative history is that Congress intended to authorize the use of quantitative controls only. Absent clear statutory language authorizing the imposition of duties, fees and similar exactions, and absent legislative history compelling an inference that Congress intended to confer such authority, it should be concluded, as the court of appeals did, that the President was without authority to impose the import license fees in controversy.

II

If Section 232(b) Empowers the President To Formulate and Prescribe Action, It Should Be Declared Invalid as an Unconstitutional Delegation of Legislative Powers.

The power to lay and collect duties and imports and to regulate foreign commerce is vested in the Congress by Article I, Section 8, Clauses 1 and 3 of the Constitution. Portions of such power may be delegated to the Executive Branch when dictated by considerations of practical necessity, but only under such clear and detailed guidelines, conditions, and limitations as the nature of the subject matter will allow. There is nothing inherent in the subject matter of section 232(b) which would preclude the delineation of actions authorized (including the imposition of duties or fees) to accomplish the statutory purpose. In effect Petitioners' construction of section 232(b) is that Congress has conferred on the President the power to prescribe the action to be taken—a fundamental legislative function under the Constitution that cannot be abdicated consistent with the separation of powers doctrine.

III

The Import License Fee System Violates the Constitutional Requirement That All Duties, Imposts, and Excises Be Uniform Throughout the United States.

The import license fee in controversy is not geographically uniform. Oil imported at a West Coast port of entry is charged with a different fee than oil imported at an East Coast or Gulf Coast port of entry under identical circumstances. Since the import fees in question constitute duties, imposts, or excises within the meaning of Article I, Section 8, Clause 1, they are invalid because they fail to meet the requirement of that Clause that such charges be applied uniformly throughout the United States.

ARGUMENT

I

SECTION 232(b) DOES NOT AUTHORIZE THE PRESIDENT TO IMPOSE DUTIES, FEES OR SIMILAR CHARGES ON IMPORTS.

The imposition of the disputed import license fees was based on the claimed authority of section 232(b) of the Trade Expansion Act of 1962, as amended. That provision authorizes the President to take "such action, and for such time, as he deems necessary to adjust the imports" of an article for the purpose of correcting a threatened impairment of the national security resulting from the quantity or circumstances in which the article is being imported. Section 232(b) does not contain express terms authorizing the imposition of any duty, fee, or other exaction with respect to the importation of articles. If such authority exists, it must be inferred from the words actually used, the legislative history and other evidence of Congressional intent.

A. THE STATUTORY LANGUAGE AUTHORIZES ONLY SUCH ACTIONS AS WILL DIRECTLY AFFECT THE QUANTITY OF IMPORTS AND MAKES NO REFERENCE TO ANY KIND OF MONETARY EXACTION.

Petitioners argue that the scope of Presidential powers as to the forms of import-related action permitted by section 232(b) is virtually unlimited and includes action to impose a duty or import license fee. They urge, in essence, that this all-encompassing authority is implicit in the statutory phrase, "such action . . . as he deems necessary". We submit that such an interpretation is erroneous, because, *inter alia*, it fails to give proper weight to other language in section 232 (b) which serves to qualify and limit the kinds of import-related action authorized. Section 232(b), read in its entirety, expresses a Congressional delegation of power "to adjust the imports" by means of quantitative import controls only.

On its face, the action authorized is limited by the stated objective (*i.e.* "to adjust the imports") and the general statutory purpose relating to national security.[1] The phrase "to adjust the imports" by itself denotes direct control over the volume of imports in question. This choice of words was entirely appropriate in light of the fact—as detailed later in this Brief—that Congress was concerned with imports in excessive quantities when it first considered and enacted this provision in 1955. It follows, then, that Congress intended to create a remedy that operated directly on the volume of imports concerned.

The legislative history of this provision shows that Congress expected such action to be taken as would control the quantity of imports in a direct and precise way. In fact, section 7 of the Trade Agreements Extension Act of 1955[2] expressly provided that the ob-

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[1] Petitioners contend that *any* measure calculated to stabilize or diminish the flow of imports of a designated article constitutes an action "to adjust the imports" concerned and, therefore, falls within the statutory scope of authority. (Pet. Brief, p. 26). Presumably, this would include such Presidential actions as (1) requiring all imported oil to be shipped on higher-cost U. S. flag vessels; (2) denying the investment tax credit provided in 26 USC 38 to oil refiners who use more than [say] 10 percent imported oil in their refinery operations; or (3) rationing gasoline, heating oil and other oil products.

[2] 69 Stat. 162. Section 7 added subsection (b) to section 2 of the 1954 Act entitled "An Act to extend the authority of the President to enter into trade agreements under section 350 of the Tariff Act of 1930, as amended," 68 Stat. 360.

ject of the authorized action was "to adjust the imports of such article *to a level*" commensurate with the national security interest (emphasis added). The phrase "to a level" clearly illustrates that the adjustment action contemplated was one which would be conducive to, and would actually result in, restricting the volume of imports to a predetermined level. By their very nature, duties, fees, and similar exactions cannot operate in so precise a fashion.[3] For that reason, it seems highly unlikely that Congress intended anything other than to authorize the use of quantitative import controls to deal with a problem identified by Congress as the importation of certain articles in quantities exceeding a "safe" level from the standpoint of national security.

The Trade Agreements Extension Act of 1958, 72 Stat. 673, amended the national security provision by directing that the effect of excessive imports of an article on defense-oriented industries be considered in making a national security determination. In effect, this amendment broadened the concept of "national

[3] This principle is well known to the responsible legislative committees and to the Congress as a whole. In 1970, for example, the Senate Finance Committee noted: "No tariff can be so scientifically set as to reasonably regulate the level of imports in accordance with the needs of the national security." S. Rep. No. 91-1431, 91st Cong., 2d Sess. 251 (1970). See also Foreign Trade Policy, Compendium of Papers on United States Foreign Trade Policy collected by the staff of the Subcommittee on Foreign Trade Policy of the House Ways and Means Committee (1958) in which several trade authorities made the same point, as for example, "An embargo, or a quota, is a quantitative restriction on imports . . . . A tariff, on the other hand, is merely a tax on imports. *It may or may not restrict trade* . . . depending on the level of the tariff and many other factors (p. 109; emphasis added).

security" for purposes of the statute.[4] At the same time the phrase "to a level" was deleted from the statute. Since that deletion was not mentioned in the committee reports or floor debates, it must be concluded that the purpose of the deletion was purely editorial. It did not signal a departure from the notion of quantitative import restrictions inherent in that phrase. An intent to make such a substantive change would surely have been explained in the legislative history. Accordingly, silence on that point indicates that the 1958 amendment made no substantive change in the national security provision as to the permissible forms of action "to adjust the imports" of any article. That conclusion is further strengthened by language in the Senate Finance Committee's report whereby the amended version of the national security provision was

[4] A provision was added requiring consideration of a number of factors bearing on the economic health of pertinent domestic industries in making a national security determination. Referring to these required considerations, Congress included the phrase "under such circumstances" in subsection (b) of the national security provision. Petitioners contend that the addition of that phrase expanded the range of authorized actions the President could take to deal with the problem identified in the statute. (Pet. Brief, pp. 27-28). There is nothing in the legislative history to support such a conclusion. Certainly, it has no foundation in the statutory language itself. Instead, the legislative history supports Respondents' position on this point, since it repeatedly describes the national security provision, as amended, solely in terms indicating that Congress contemplated restrictions on the volume of imports. This can be seen in the examples cited in footnote 5, *infra*. In addition, the Senate Finance Committee described the amendment as requiring the President to "take into consideration the effect on the national security in the weakening of the general economy by *excessive imports* of competitive products." S. Rep. No. 1838, 85th Cong., 2d Sess. 2 (1958); emphasis added.

described exclusively in terms associated with quantitative import controls.[5]

Reference to the national security provision in the legislative history of the Trade Expansion Act of 1962, which amended that provision, is formulated in the same vein. Thus, in the Senate Finance Committee Report the national security provision is described in the pertinent part as follows:

> "The bill retains present provisions governing the authority of the President *to adjust the level of imports* when he finds they threaten to impair the national security." S. Rep. No. 2059, 87th Cong., 2d Sess. 9 (1962); emphasis added.[6]

In view of the foregoing, it appears plain beyond dispute that the concept underlying the national security provision contemplates (1) a determination as to

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[5] For example, the Senate Finance Committee in its report explained, "As was the purpose when the national security section was added in the 1955 extension of the Act, the amendments are designed to give the President unquestioned authority *to limit imports* which threaten to impair defense-essential industries." *Id.* at p. 7; emphasis added. The Committee also stated that under the bill imports of an article must be adjusted "unless the President finds that they are not entering *in such volume* as to threaten the national security." *Ibid.*; emphasis added. It should be noted that the Congress also expanded the class of articles to which import restrictions could apply to "derivatives" of the named article. That amendment was explained in the Senate Finance Committee's report as follows:

> "The need for such additional language is obvious, for *a limitation of the materials alone* would serve only to spur the importation of the finished or semi-finished products which are, in the final analysis, the very items most essential to the defense of the country." *Id.* at p. 12; emphasis added.

[6] Almost identical language is found in H. Rep. No. 1818, 87th Cong., 2d Sess. 3 (1962).

the level of imports of an article that can be permitted consistent with the national security, and (2) action to restrict the volume of imports to that level. That concept necessarily implies the use of direct controls only, inasmuch as import duties or fees are inherently inexact in their influence on the volume of imports, and therefore, are fundamentally unsuited for the task of limiting the volume of imports to a specific level.[7] It is widely acknowledged among international trade experts that an import duty or fee does not exert a direct influence on the volume of imports.[8]

B. THE LEGISLATIVE HISTORY OF SECTION 232(b) DEMONSTRATES THAT THE ONLY AUTHORITY TO BE DELEGATED BY CONGRESS WAS THE AUTHORITY TO IMPOSE DIRECT OR QUANTITATIVE CONTROLS ON IMPORTS TO CORRECT A THREATENED IMPAIRMENT OF THE NATIONAL SECURITY.

The preceding references to the legislative history of section 232(b) relate to the statutory terminology and structure which, in turn, shed light on the probable legislative intent underlying that provision. More importantly, the legislative history shows that Congress

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[7] In a paper, entitled "The Use of Quotas for the Regulation of Imports", Professor Gottfried Haberler, Harvard University, noted, "Tariff protection leaves the quantity of imports variable." Reprinted in Foreign Trade Policy Compendium, *supra*, note 3, at p. 640.

[8] "Trade controls can be classified into two major categories: those trade controls that directly influence prices, such as taxes and subsidies, and those that directly influence quantities, such as quotas . . . ." Chacholiades, M., *The Pure Theory of International Trade* (Chicago 1973) at 395. It is clear from the language of the statute alone that the types of action authorized were such as would directly influence the quantity of imports, rather than their price. Of course, in the extreme situation, a duty or fee can have a prohibitive effect on the volume of imports. It can be reasonably assumed that a $100,000 per barrel fee on imported oil would have the effect of an absolute prohibition on oil imports.

had a very specific intent when it enacted the original provision in 1955, that that intent was to confer on the President the power to impose quantitative import controls only, and that such intent was not altered in subsequent amendments and re-enactments of that provision.

1. Trade Agreements Extension Act of 1955.

Section 232(b) had its genesis in section 7 of the Trade Agreements Extension Act of 1955. The substance of that provision has remained basically unchanged since then. Consequently, its legislative history is especially significant in determining the intended scope of authorized actions under section 232(b).

The problem of rising imports of oil in relation to the national security had been a matter of recurring public debate following World War II up until the enactment of section 7 in 1955. In October 1945 the Petroleum Industry War Council recommended a national security policy that "only such amounts of oil should be imported into this country as is absolutely necessary to augment our domestic production."[9] Later, in 1950, the Subcommittee on Oil Imports of the Select Committee on Small Business recommended that voluntary quotas on oil imports be established for the purpose, among others, of protecting national security capabilities.[10] In adopting that

[9] The Council was appointed by the Petroleum Administrator for War. The Council's public statement in which the quoted recommendation was made is reprinted in H. Rep. No. 2344, "Effects of Foreign Oil Imports on Independent Domestic Producers", 81st Cong., 2d Sess. 48 (1950).

[10] *Id.* at p. 147.

recommendation the Subcommittee rejected a proposal to impose an excise tax on oil imports on the ground that the objective of limiting the quantities of oil imports to set levels would not be achieved by means of a tariff. The Subcommittee found that there was no basis upon which to conclude that a tax in any amount "would limit the importation of any quantity of oil, a certain quantity of oil, or all oil imports."[11] In 1953 the House Ways and Means Committee favorably reported H.R. 5894, a bill to amend the Trade Agreements Extension Act of 1951, which, for national security reasons, included a statutory quota on imports of crude petroleum and residual oil.[12] The bill was recommitted by the House, evidently because of the controversial nature of some of the amendments. Instead, Congress opted for a simple one-year extension of the trade agreements authority.[13] When that trade agreements authority expired in the following year, an additional one-year extension was enacted, but with a limitation, sponsored by Senator Symington, prohibiting any tariff reduction which would threaten domestic production of any national defense requirement.[14]

Section 7 of the Trade Agreements Extension Act of 1955 was added by the Senate Finance Committee to

[11] *Id.* at p. 142.

[12] H. R. Rep. No. 777, 83rd Cong., 1st Sess. 7 (1953). The report stated:

> "During the hearings held on this subject the committee received convincing testimony that significant increases in these imports during recent years have been injurious to our domestic economy and detrimental to our national security."

[13] The Trade Agreements Extension Act of 1953, 67 Stat. 472.

[14] 68 Stat. 360.

a House-passed bill amid renewed expressions of concern about the quantity of foreign oil entering the United States and its effect on the national security. The initial approach to the oil problem was to restrict oil imports by statute to a fixed percentage of domestic production. An amendment to that effect was offered by Senator Neely during the Senate Finance Committee's hearings.[15] This was followed by the introduction of other amendments to impose similar restrictions or increased duties on imports of fluorspar, lead and zinc.[16] The Committee was thus faced with the political dilemma of avoiding a flood of "pet" amendments designed to protect various domestic industries against import competition for other than national security reasons, or where the national security justification was less certain than in the case of oil. The Committee's decision to delegate *any* authority to the President, therefore, must be understood as a response to political circumstances perceived at that time, that is, the difficulty of winning support for a statutory quota for oil alone. Thus, during the Senate floor debates, Senator Millikin (ranking minority member of the Finance Committee) explained:

> "One of the great pressures on the committee was for the adoption of amendments relating to specific commodities. The pressures were the greater because in each case there was a volume of evidence indicating the importance of those amendments to

[15] The Neely amendment, introduced on March 2, 1955, provided that "the total quantity of crude petroleum and petroleum products . . . which may be imported into the United States in any calendar quarter of any year shall not exceed 10 per centum of the total domestic petroleum demand . . . for the corresponding quarter of the previous year".

[16] S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955).

> the livelihood and happiness of many people." (101 Cong. Rec. 5299)

To the same effect, Senator Barkley (a member of the Finance Committee) observed:

> "Many Senators felt impelled by local situations and their own obligations to support individual amendments called for reservations, exemptions, or quotas for particular products. However, the amendment approved by the committee was voted for by an overwhelming majority of the committee, in lieu of the other amendments." (101 Cong. Rec. 5298)

Although section 7 was not specific as to any individual commodity, Congress understood that the cardinal purpose of that provision was the establishment of a quota on imports of oil.[17] The explanation of the national security amendment contained in the Senate Finance Committee report demonstrates this overriding concern by its emphasis on the recommendations

[17] During the floor debates Senator Robinson characterized section 7 as "the foreign oil limitation amendment." 101 Cong. Rec. 4306. In the second session of the same Congress, Congressman Siler, testifying on the trade agreements program before the House Ways and Means Committee, recounted the purpose of section 7 as follows:

> "The President signed this bill [referring to the Trade Agreements Extension Act] on June 21, 1955, with the amendment providing a means to restrict excessive oil imports. The clear understanding of the Congress at the time was that oil imports would be held to their 1954 relationship to domestic production. . ." Hearings before a Subcommittee of the House Ways and Means Committee on Administration and Operation of Customs and Tariff Laws and the Trade Agreements Program, 84th Cong., 2nd Sess., Sept. 24-28, 1956, at p. 987.

of the President's Advisory Committee on Energy Supplies and Resources Policy that imports of crude and residual oils be limited (preferably on a voluntary, but government-monitored basis) to the proportion such imports bore to domestic production in 1954 in the interest of national security.[18]

The significance of the Senate Finance Committee's reliance on the recommendations of the President's Advisory Committee was brought out during the Senate floor debates on section 7. A colloquy between Senator Carlson (a member of the Senate Finance Committee) and Senator Daniel is particularly revealing on this point:

> Mr. DANIEL. As a member of the committee, is it the opinion of the Senator from Kansas [Senator Carlson] that a majority of the committee, which supported the amendment, intended that the necessary action be taken to keep imports from exceeding the 1954 ratio, which has been interpreted by the President's advisory committee as the ratio beyond which injury would be done to the national security?
>
> Mr. CARLSON. One reason why I say that is very definitely the opinion of the committee, or at least the intent of the committee, is the fact that the chairman of the Finance Committee included in the report of the committee a part of the Advisory Committee's report, which, after all, in my opinion, gives the intent of the Finance Committee." (101 Cong. Rec. 5390) [19]

[18] These recommendations were contained in a report of the President's Advisory Committee released by the White House on February 26, 1955. Extensive excerpts were printed in the Senate Finance Committee Report. S. Rep. No. 232, *supra*, note 16 at p. 4.

The political acceptability of the section 7 "substitute" was, of course, dependent upon Executive Branch assurance that the primary purpose of the amendment (*i.e.* the establishment of quantitative limitations on oil imports) would be effectuated administratively under that authority.[20] It appears that such assurance was, in fact, given.[21]

Despite this background, Petitioners claim that Congress intended to delegate tariff-making power to the President in addition to the power to impose quantitative import controls. The overwhelming weight and direction of the legislative history is to the contrary.

The most authoritative evidence of legislative intent, apart from the statutory language itself, is the Report of the Senate Finance Committee. (S. Rep. No. 232, 84th Cong., 1st Sess. (1955)). Its probative value

[19] Senator Carlson stated that his colloquy with Senator Daniel reflected his understanding of "the congressional intent, including the intent of the Finance Committee." (101 Cong. Rec. 5301)

[20] During the debate on the conference report, Senator Douglas explained the central purpose of section 7 as follows: "All of us know what is behind that clause. . . . It involves, first the question whether actual or relative embargoes shall be imposed upon residual oil from South America, in order to protect coal and some of the oil producers of the United States." (101 Cong. Rec. 8244)

[21] Senator Carlson explained that he supported section 7 because he had been "assured by those in the administration responsible for the administration of the trade-agreements program that if such amendment were adopted by the committee and by Congress action would immediately follow, and that imports of petroleum and its products would be definitely restricted." (101 Cong. Rec. 5389).

derives from the fact that it represents the views of the whole Committee (except for Senator Malone who opposed the trade agreements extension bill in its entirety) formally adopted after review of the written document, as distinguished from the generally extemporaneous (and, therefore, less reliable) remarks of individual Senators made during the floor debate. That Report makes no mention whatever of any tariff, duty or similar charge on imports of any national security item.

The record of the Senate floor debates, taken as a whole, further substantiates the court of appeals' decision and the position of Respondents in this case. Section 7 was discussed extensively and was almost uniformly referred to or described in terms denoting quantitative or direct restrictions on imports. For example: Senator Barkley explained that section 7 reflected the Finance Committee's view that "instead of undertaking to impose *quotas*" by statute, Congress should authorize the President to do so;[22] Senator Malone characterized this provision as authorizing the President to "arrange *quotas or safeguards;*"[23] Senator Daniel noted that the responsibility of the Office of Defense Mobilization under section 7 was to report to the President when imports of a particular commodity "might be at such a *ratio* that they would endanger the national security;"[24] Senator Monroney stated that section 7 conferred on the President the power "to impose *quotas*";[25] Senator Carlson explained that section 7 generalized certain specific com-

[22] 101 Cong. Rec. 5298; emphasis added.

[23] 101 Cong. Rec. 5311; emphasis added.

[24] 101 Cong. Rec. 5391; emphasis added.

[25] 101 Cong. Rec. 5539; emphasis added.

modity amendments which provided for "the limitation of oil imports and the limitation of other imports on a *percentage or quota basis*";[26] and Senator Douglas observed that section 7 gave the "President the power to put import *quotas* into effect" and expressed his expectation that "oil, coal, fluorspar, zinc and lead will have *quotas* imposed upon them."[27]

In response to questioning by Senator Saltonstall, Senator Byrd (Chairman of the Finance Committee) explained that section 7 "puts other commodities on the same basis as agricultural commodities" and concluded:

> "It simply leaves to the President the power in his discretion, to decide whether *to impose a quota or to reduce the imports.*" (101 Cong. Rec. 5297; emphasis added.)

Plainly, Senator Byrd believed that the President's section 7 authority did not extend beyond the imposition of direct or quantitative limitations on imports. This conclusion is reinforced by Senator Byrd's reference to agricultural commodities by which he impliedly drew a parallel between the President's authority under section 22 of the Agricultural Adjustment Act (7 USC 624) and under section 7. In the immediately preceding colloquy with Senator Thye, Senator Byrd described section 22 exclusively in terms of quantitative import controls, as follows:

> "Mr. BYRD. . . . The President upon investigation, can impose *quotas* on agricultural products under section 22 of the Agricultural Adjustment Act.
>
> * * *

[26] 101 Cong. Rec. 5389; emphasis added.

[27] 101 Cong. Rec. 5584; emphasis added.

> "Mr. BYRD. . . . The existing law now provides that on agricultural products, the President has a right to impose *quotas* after an investigation has been made." (101 Cong. Rec. 5296; emphasis added.)

It seems indisputable, then, that Senator Byrd believed the authority granted by section 22 of the Agricultural Adjustment Act was confined to quantitative or direct import controls, and that the authority conferred by section 7 was likewise so confined.[28]

To a large extent Petitioners' argument that Congress intended to delegate tariff-making powers to the President is based on statements made during the Senate floor debates. Only two of the statements cited by Petitioners make any mention whatever of import duties or similar monetary exactions. Pet. Brief, pp. 36-37. One of these was made by Senator Bennett in reply to Senator Barkley's question whether the domestic fluorspar industry could receive the same favorable treatment by the Office of Defense Mobilization (ODM) that had already been accorded the domestic lead and zinc industry. (101 Cong. Rec. 5587). The question was raised following Senator Bennett's detailed account of how the lead and zinc industry had benefitted from a variety of governmental actions, including stockpile buying and exploration subsidies,

[28] Petitioners correctly point out that section 22 of the Agricultural Adjustment Act at that time authorized the President to impose fees or quantitative limitations to ensure the integrity of agricultural support programs. Pet. Brief, pp. 38-39. Petitioners conclude from this that Senator Byrd must have thought section 7 empowered the President to impose fees. As shown in the text above, however, Senator Byrd was not aware that section 22 authorized the imposition of fees or, at least, that he only had quantitative limitations in mind.

even though the President had not acted to withdraw tariff concessions on lead and zinc in the wake of an affirmative escape clause determination by the Tariff Commission. (101 Cong. Rec. 5585-5587). Senator Bennett further indicated that these programs resulted in a greater benefit to the domestic industry than a tariff increase (*i.e.* restoration of a prior tariff cut) would have provided.[29] He suggested, however, that the President could still restore a prior tariff cut because "lead and zinc are officially in the hands of the ODM as a result of the escape clause provision and a reference from the President." (101 Cong. Rec. 5588). Against that background, it is obvious that Senator Bennett was referring to administrative authority under a number of different statutory provisions when he stated:

> "As I understand the bill, the ODM will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry, and to meet its particular needs." *Ibid.*

Petitioners' contention that Senator Bennett was describing section 7 alone is patently wrong, and therefore, the statement does not support the assertion that section 7 granted tariff-making authority to the President.

The other floor statement relied on by Petitioners was made by Senator Millikin (ranking minority mem-

[29] Senator Bennett also stated that in view of the administrative actions taken to protect the domestic lead and zinc industry, he had been willing to withdraw his amendment which would have provided for an excise tax on lead and zinc imports. 101 Cong. Rec. 5587. The adoption of section 7 by the Senate Finance Committee, of course, had the same effect as withdrawal.

ber of the Finance Committee) in which he indicated that the President "may use tariffs, quotas, import taxes or other methods of import restriction" pursuant to section 7 (101 Cong. Rec. 5299). The court of appeals gave little weight to this, apparently because it thought it was made for a parochial purpose. (Pet. App. 17a). It is clear, in any event, that Senator Millikin's description, as interpreted by Petitioners, is fundamentally at odds with the substance of the floor discussion on the subject. Moreover, it is inconsistent with another statement he made later that day (May 2, 1955) concerning the scope of section 7. In response to a question by Senator Bennett, Senator Millikin indicated that the *remedies* available under section 7 were the same as those available under the escape clause provisions.[30] The President's authority under the escape clause provisions in force at that time, however, extended only to the imposition of quotas or the withdrawal of prior tariff concessions, as recommended by the Tariff Commission.[31] In short, the only

[30] "MR. BENNETT. Is not the effect of the bill to provide two avenues by which an industry which might consider itself injured could receive a remedy: One through the Tariff Commission, and the other through the Office of Defense Mobilization?

"MR. MILLIKIN. I should say so; and I should further say that neither is exclusive. All the remedies available before these remedies were proposed [*i.e.* escape clause remedies] will be available afterward, particularly those which focus on defense industries." 101 Cong. Rec. 5302.

[31] Section 7, Trade Agreements Extension Act of 1951, 65 Stat. 72, as amended. A number of Presidential actions under the claimed authority of this provision were challenged in court and held invalid. In *Falcon Sales Co.* v. *United States*, 199 F. Supp. 97 (1961), for example, the U. S. Customs Court overturned the President's withdrawal of a prior tariff concession pursuant to an affirmative escape clause determination by the Tariff Commission, whereas the Tariff Commission had recommended the imposition of a quota as the appropriate remedy. The court held that the statute only permitted the President to accept or reject the Tariff Commission's recommendation. It did not give him authority to formulate a remedy different from that recommended. To the same effect, see *United States* v. *Schmidt Pritchard & Co., Mangano Cycles Co.*, 47 Ct. of Cust. & Pat. App. 152, *cert. denied*, 364 U.S. 919 (1960).

tariff action the President could take was to restore a tariff previously reduced pursuant to a trade agreement.

Senator Millikin's analogy between the escape clause provisions and section 7 provides a basis for reconciling his apparently contradictory statements. His earlier reference to tariffs and import taxes is more readily understandable if seen in the context of the so-called Symington amendment which had been enacted into law in 1954 and which was amended by section 7. That provision (now found in section 232(a) of the Trade Expansion Act of 1962, as amended) prohibited the President from reducing the tariff on any defense-essential article pursuant to his trade agreement authority. Senator Millikin may well have thought he was describing the requirements of *both* subsections (a) and (b) of the pertinent statute, rather than subsection (b) which was added by section 7. Under this analysis it would follow that Senator Millikin's statements related to tariff powers *only* in the context of Presidential action under the Symington amendment.[32]

[32] Additional credence is given this reading by the fact that Senator Millikin was speaking of the importance which he attached to assisting domestic industries "to supply the commodities needed for national defense *or* security." (101 Cong. Rec. 5299; emphasis added). Since by its terms subsection (b)—*i.e.* section 7—applied to "national security," while subsection (a) applied to "national defense," it would be reasonable to assume that he had both subsections in mind when he made the statements discussed above.

Section 7 was passed by the Senate without change as part of the trade agreements extension bill. A technical modification was made by the House-Senate Conference Committee[33] and subsequently approved by both Houses of Congress. Because the House acceded to the Senate's addition of section 7 to its trade bill, it must be assumed that that body's underlying intent was the same as the Senate's, that is, to authorize the President to restrict excessive imports of national security items by direct means.[34]

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[33] H.R. Conf. Rep. No. 745, 84th Cong., 1st Sess. 2, 6, 7 (1955).

[34] When Congressman Cooper (Chairman of the Ways and Means Committee) presented the conference report on the floor of the House, he made a point of noting that the concept of national security was broad and that strengthening the economies of our allies (by promoting trade with them) contributed to the national security of the United States. (101 Cong. Rec. 8161). Accordingly, the President was bound to weigh with care the adverse national security impact of refraining from reducing import duties (under the Symington amendment) or of imposing a quota under section 7 of the bill. Petitioners argue that Mr. Cooper's reference to "any modification of a duty on imports or a quota" means that he, at least, thought the Senate amendment granted tariff-making powers to the President. (Pet. Brief, p. 40). It is clear from the context, however, that Mr. Cooper was speaking about both the Symington amendment (now contained in section 232(a); 19 USC 1862(a)) and section 7 of the bill (section 232(b); 19 USC 1862(b)). The reference to a quota applied only to section 7. This reading is further strengthened by the fact that Congressman Mills, who along with Congressman Cooper had participated in the conference committee consideration of the bill, later stated that the conferees "intended that the injury be eliminated immediately in the interest of national defense through the use of a quota" and that the use of a duty was never intended. 116 Cong. Rec. 37848 (1970).

2. Trade Agreements Extension Act of 1958.

In 1958 Congress reenacted the national security provision with amendments. The changes related solely to matters of procedure and the criteria for invoking the authorized action.[35] No amendment was made, or proposed, to alter in any way the types of action that the President could employ "to adjust the imports" concerned to a level that would not threaten to impair the national security. Accordingly, the 1958 legislation cannot be cited as granting tariff power to the President where none previously existed.

3. Trade Expansion Act of 1962.

Congress reenacted the national security provision in section 232 of the Trade Expansion Act of 1962. Subsection (a) thereof incorporated the so-called Symington amendment (reservation of defense-related articles from negotiated tariff concessions), while subsections (b) through (d) incorporated—without substantive change—the corresponding subsections enacted in 1958.[36] Nothing in the 1962 legislation expanded the President's authority as to the types of actions he was permitted to take "to adjust the imports" of oil or any other article. No Executive Branch attempt had been made, prior to that time, to impose any kind of monetary charge on imports under the national security provision.

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[35] S. Rep. No. 1838, *supra* note 4, at pp. 11-12.

[36] "The bill retains present provisions governing the authority of the President to take action to adjust the level of imports when he finds they threaten to impair the national security." H.R. Rep. No. 1818, 87th Cong., 2d Sess. 3 (1962).

C. CONGRESS TOOK NO ACTION SUBSEQUENT TO THE TRADE EXPANSION ACT OF 1962 TO AUTHORIZE THE PRESIDENT TO IMPOSE DUTIES, FEES, OR OTHER EXACTIONS.

1. Proposed Trade Act of 1970.

In August 1970 the House Ways and Means Committee favorably reported a comprehensive trade bill written in committee. (H.R. 18970, 91st Cong., 2d Sess.) Section 104(a) of that bill would have amended section 232(b) by adding the proviso: "That any adjustment of imports shall not be accomplished by the imposition or increase of any duty, or of any fee or charge having the effect of a duty." The inclusion of that amendment was apparently prompted by the report of the Cabinet Task Force on Oil Import Controls, released earlier that year, which recommended the adoption of a variable tariff for oil imports beginning January 1, 1971, in lieu of the oil import quotas then in force.[37] In its report the Cabinet Task Force asserted that the President had such tariff power under section 232. (See Pet. Brief, pp. 5-6).

The trade bill was subsequently passed by the House and favorably reported by the Senate Finance Committee. The 91st Congress expired before the bill could be debated and voted on.[38]

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[37] *The Oil Import Question*, Cabinet Task Force on Oil Import Control (1970).

[38] Following the release of the Cabinet Task Force report on February 20, 1970, President Nixon ordered George A. Lincoln, Director of the Office of Energy Preparedness, to make recommendations on the oil import question with the advice of the Oil Policy Committee. In a letter dated August 13, 1970, Mr. Lincoln recommended to the President, with the concurrence of the Oil Policy Committee, that further consideration of a tariff system be discontinued and that the then current quota system to be continued and improved. Hearings and Informal Proceedings before the Committee on Finance, United States Senate, 91st Congress, 2d Session, on Amendments 925 and 1009 to H.R. 17550, Amendments to Incorporate the Text of the Trade Act of 1970, pp. 279-292 (October 9 and 12, 1970). This recommendation was accepted by the President, thereby obviating the pressure for prompt Congressional reaction.

Petitioners indirectly assert that the section 232(b) amendment reflects an understanding by Congress that tariff power had previously been delegated to the President by section 232(b) and that, because that amendment did not pass, the President's purported tariff powers remained intact. (Pet. Brief, p. 47). The legislative history of that bill directly contradicts that claim and demonstrates that the purpose of the section 232(b) amendment was to *clarify* the scope of that section. This can be seen from the following statement in the House Ways and Means Committee Report:

> "The committee has reviewed the legislative history of section 232 of the Trade Expansion Act and its predecessor provisions in the trade agreements legislation, and concludes that the delegation of authority to the President to adjust imports should be limited to the use of quantitative limitations." H. R. Rep. No. 91-1435, 91st Cong., 2d Sess. 23 (1970).[39]

Because the Committee's conclusion was based on its review of the legislative history, it seems obvious that the Committee was expressing its view that no tariff powers had ever been delegated to the President under section 232 or its predecessors.

When this provision was debated on the House floor, Congressman Mills, Chairman of the Ways and Means Committee, provided the following insight into the legis-

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[39] Identical language is found in the Senate Finance Committee's report. S. Rep. No. 91-1431, 91st Cong., 2d Sess. 251 (1970).

lative intent underlying the 1955 and 1958 versions of section 232(b):

> "I had something to do with the drafting of the national security provision back in the 1950's. The late Senator Kerr and I worked on it in conference with other Members. Mr. BYRNES was also a Member. You remember we did it in the conference. The House adopted it, and the Senate adopted the provision, too. What is here in law now we worked out in that conference. *We never intended any such use of tariff duty adjustments.* Whenever an industry essential to national defense was being impaired by imports *we intended that the injury be eliminated immediately in the interest of national defense through the use of a quota,* which would do it." (116 Cong. Rec. 37848; emphasis added.)

2. Trade Act of 1974.

The Trade Act of 1974, 88 Stat. 1978, amended section 232(b). These amendments were purely procedural. Consequently, there is nothing in the Trade Act of 1974 which expanded the President's authority to permit him to impose a duty, fee, or similar charge on imports of any article for national security reasons. The legislative history of that Act contains no statement which would warrant in any way the conclusion suggested by Petitioners that Congress intended to approve the imposition of the import license fee under the putative authority of section 232(b). To the contrary, Congress intended to reserve judgment on that issue to a later date when it could take up the problem of oil imports and energy resources in a comprehensive manner. Thus, the House Ways and Means Committee in its report stated:

> "It is the intention of the Committee to return to this important problem of establishing a rational and equitable allocation of imported energy resources." H.R. Rep. No. 93-571, 93rd Cong., 1st Sess. 36 (1973).[40]

Petitioners contend that the failure of Congress to take affirmative legislation action to disapprove the import license fee system first established by President Nixon in April 1973 has the effect of ratifying the exercise of authority not previously conferred (Pet. Brief, p. 48). Apart from the foregoing evidence that demonstrates Congress did not intend to ratify such action, it is important to note that the Nixon import license fee system did not materially increase the monetary burden on imports of oil. This is so because Presidential Proclamation No. 4210 (38 Fed. Reg. 9645 (1973)) *suspended* the "regular" customs duties on oil imports and

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[40] In accordance with its declared intention, the House Ways and Means Committee turned its attention to the question of energy resources and oil imports after it had completed its work on the Trade Act of 1974. The result of the Committee's deliberations was H.R. 14462 (proposed Oil and Gas Energy Tax Act of 1974) which it reported to the House on May 4, 1974. H.R. Rep No. 93-1028, 93rd Cong., 2d Sess. (1974). The bill was never voted on by the House. The bill would have amended section 232 to authorize the President to impose duties, taxes, or fees on petroleum imports under detailed standards and procedures, including limitations on the rate of monetary exactions that could be charged. This illustrates that when Congress intends to delegate tariff powers, it does so in explicit language, under clearly circumscribed conditions and under precise limitations. Against that typical mode of drafting tariff power delegations, the fact that section 232(b) and its predecessors are silent on the subject of duties, fees or similar charges would seem to negate Petitioners' argument that Congress intended to confer tariff power on the President.

substituted license fees at commensurate rates.[41] Therefore, President Nixon's license fee program amounted to a change in form rather than substance. As a result, there was no pressing need or motivation for Congress to respond to it.

In any event the proposition advanced by Petitioners that so fundamental a power as the power to tax can be transferred from the Congress to the Executive Branch by implied Congressional ratification—which is to say by Congressional default in the face of Executive Branch usurpation—is fraught with the greatest danger to our system of government. We submit that any application of the so-called ratification doctrine of statutory construction, where the tax or tariff power is involved, must be narrowly confined to situations in which the evidence shows Congress, after due deliberation or other form of actual consideration, intended to follow a course of conduct tantamount to affirmative legislation. Such a conscious choice to delegate power by inaction is not present here. To the contrary, the evidence shows a prevailing Congressional disinclination to relinquish such broad power to the President.

3. Congressional Responses to President Ford's Import License Fee Program.

In his State of the Union Message of January 15, 1975, President Ford announced that he was requesting

[41] Item No. 475.10 (column 1) of the Tariff Schedules of the United States (19 USC 1202) provides for a duty of 0.25 cents per gallon on crude petroleum imports (testing 25 degrees A.P.I. or more). Since there are 42 gallons to the barrel, this duty rate is equivalent to 10.5 cents per barrel. Presidential Proclamation No. 4210 instituted a license fee on crude oil imports of 10.5 cents per barrel on crude oil in lieu of the 10.5 cents per barrel equivalent provided by the Tariff Schedules.

the Congress to act within 90 days on a comprehensive energy tax program which, among other things, would authorize him to impose "[e]xcise taxes and import fees totalling $2 per barrel on product imports and on all crude oil." [42] Although Congress did not so act, Presidential Proclamation 4341 was issued on January 23, 1975, imposing a supplemental license fee on oil imported on or after February 1, 1975, at the rate of $3 per barrel to be phased in over three successive stages in increments of $1.[43]

Exactly one week after the President issued Proclamation 4341, the House Ways and Means Committee reported H.R. 1767 (94th Cong., 1st Sess. (1975)), a bill which would have suspended all Presidential authority under section 232(b) for a 90-day period and would have nullified that Proclamation. By February 19, 1975, both houses of Congress had passed H.R. 1767, but the President vetoed it on March 4, 1975.

It is clear that Congress saw the President's action as a usurpation of its Constitutional powers and responsibilities.[44] Thus, the House Ways and Means Commit-

[42] Reprinted in Hearings before the House Ways and Means Committee on Petroleum; Public Debt Ceiling Increase; and Emergency Tax Proposals, 94th Cong., 1st Sess. 3, 8 (January 1975).

[43] The $1 per barrel supplemental fee was applicable to oil imports made between February 1 and May 30, 1975, inclusive (Pres. Procs. 4355, 4376, and 4377). The $2 per barrel fee was in effect thereafter through December 21, 1975 (Pres. Proc. 4412). The $3 per barrel fee was never actually imposed.

[44] During the House Ways and Means Committee hearings Congressman Vanik stated that he was "troubled" by what he believed to be "the use or misuse of the President's power under the national security clause." In his view there was "a serious constitutional question" because the import license fee was "an

tee regarded H.R. 1767 as "essentially a response, and a much needed response, to the precipitous action taken by the President on January 23" because such action "*anticipated* enactment of legislation" authorizing import fees. (H.R. Rep. No. 94-1, 94th Cong., 1st Sess. 3 (1975); emphasis added). The Committee expressed its "basic concern" as to "the effect the Proclamation has on the authority of the Congress," and concluded that "there is no doubt" that the President's exercise of tariff powers "*pre-empts* the choices that are otherwise available to the Congress" in exercising its Constitutional powers in the tax and tariff field. (*Ibid.* at 12; emphasis added). Elaborating on that fundamental point the Committee stated:

> "The existing license fee system and the import fee system proclaimed January 23 establishes a separate taxing mechanism, defining taxable units and categories of goods, determining equities among taxpayers based on assumed special circumstances, and assigning revenue collection responsibilities. The whole revenue and tariff system established by the President is outside the tariff and customs law and the Internal Revenue Code, and none of the criteria and guidelines for administering the system has been approved by the Congress."
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> * * *
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> "The long and continued use of such a broad authority as Section 232 in the exercise of basic legislative functions of raising revenues and regulating commerce erodes the authority of the Congress and

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intrusion on one of the few remaining powers of the Congress and that is the power to tax." Hearings, *supra* note 42 at p. 285. Similarly, Congressman Green characterized establishment of the fee system as "the arbitrary exercise of Presidential power." *Ibid.* at p. 303.

> prevents it from fully exercising its constitutional responsibilities." *Id.* at 17.[45]

We submit that the Congressional reaction to the import license fee system decreed by the President on January 23, 1975, dramatizes the tenuousness of Petitioners' suggestion that Congress ratified the import license fee system.[46]

D. CONGRESSIONAL DELEGATIONS OF TARIFF AUTHORITY HAVE BEEN CONSISTENTLY CIRCUMSPECT AND SPECIFIC: SINCE SECTION 232(b) IS DEVOID OF EXPLICIT OR COLORABLE LANGUAGE DELEGATING TARIFF AUTHORITY TO THE PRESIDENT, THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE IMPOSITION OF IMPORT FEES WAS UNAUTHORIZED.

In ascertaining the Congressional intent, the court of appeals in this case emphasized the fact that, historically, whenever Congress has intended to require or authorize the imposition of import duties or similar

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[45] In its report the Committee showed that it was cognizant of an impending suit to challenge the validity of the import license fee system in court, as follows:

> "There is certainly grave doubt, at least, that a Court would uphold a claim that the Congress attempted to delegate virtually unlimited power to impose fees, no matter what euphemism is selected to denominate them, as a means of restricting imports. In any event, however, we understand the scope of that delegation will soon be determined in a Court action." *Id.* at p. 15.

[46] This applies not only to the Ford program but also to the pre-existing Nixon program. In that connection the House Ways and Means Committee report on H.R. 1767 stated that the bill did not ". . . ratify any previous actions by any President made in reliance on the National Security provisions of the Trade Expansion Act to impose dollar fees on imports, no matter whether this was done with or without public hearings and no matter whether done by Proclamation or in any other way." *Ibid.*

charges as the means of dealing with a problem relating to the foreign commerce of the United States, it has—without exception as far as we are able to determine—done so in explicit or otherwise precise terms. (Pet. App. at 14a). The appellate court below regarded this background of *consistent particularity* in Congressional delegations of tariff powers to the Executive Branch as strongly militating against Petitioners' contention that Congress intended to delegate tariff powers under a "blanket" delegation of authority.[47] We fully agree with that view.

Section 232(b) follows in concept and structure a number of other statutory provisions designed to safeguard a particular national economic or other interest from being adversely affected by imports. The most prominent of these other provisions can be summarized as follows:

(a) 19 USC 160 et seq. (The Antidumping Act, 1921, as amended).

This Act requires the imposition of a special "dumping duty" on an imported article sold at less than its fair value where such "dumping" causes injury to a domestic industry. The additional duty is generally equal to the difference between the price at which the article is sold for consumption in the country of origin

[47] The United States Customs Court in *Schmidt Pritchard & Co. v. United States*, 167 F.Supp. 272 (1958), also regarded the pattern of consistent Congressional particularity in tariff and trade legislation as a persuasive guide to legislative intent. Thus, the court declared: "It is of historic significance and importance that when Congress has intended to endow the Chief Executive with power and authority to exercise independent judgment designed to modify the tariff structure it has done so in clear and explicit terms." (At p. 279). *Aff'd*, 47 Ct. Cl. of Cust. & Pat. App. 152; *cert. denied*, 374 U.S. 919 (1960).

and a lower price on export sales to the United States market. Responsibility for determining whether sales at less than fair value exist is vested in the Secretary of the Treasury. Responsibility for determining whether the injury test is met is vested in the U.S. International Trade Commission.

(b) 19 USC 1303 (Countervailing duties).

This provision requires the Secretary of the Treasury to impose a special "countervailing duty" on imported articles where a "bounty or grant" is paid or bestowed in the foreign country of origin with respect to the manufacture or exportation of such articles. The additional duty must be equal to the amount of such "bounty or grant" as determined by the Secretary.

(c) 19 USC 1337 (Unfair practices in the import trade).

This provision declares unlawful unfair practices engaged in by United States importers and foreign exporters which tend to cause substantial injury to a domestic industry or tend to restrain or monopolize trade and commerce in the United States. The U.S. International Trade Commission is charged with the responsibility of making the appropriate factual determination. The Commission is empowered to order the total exclusion of the articles concerned from entry into the United States as long as the offending trade practices continue or, in lieu of such exclusion, to issue "cease and desist" orders. Under prescribed procedures, the President is permitted to negate the Commission's decision "for policy reasons". No other type of corrective action such as the assessment of an additional duty or similar charge) is provided for in the statute.

(d) 19 USC 2251 et seq. (Import relief or "escape clause" provisions).

These provisions require the U.S. International Trade Commission to determine, upon proper application, whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof," to the competing domestic industry. If the Commission makes an affirmative determination, the President is required to provide import relief unless he determines such relief is contrary to "the national economic interest." The President is empowered to provide relief by any of four specified methods, or any combination thereof. He may increase the rate of duty on the imported article up to 50 percent *ad valorem* above the rate existing at that time. He may proclaim a tariff rate quota. He may modify or impose a quantitative restriction on the importation of such articles (but not to a level less than the quantity or value of that article imported during the most recent representative period). He may negotiate orderly marketing agreements with foreign supplying countries to limit their exports to the United States. Generally, the forms of relief may not remain in effect for a period exceeding five years.

(e) Section 22 of the Agricultural Adjustment Act of 1933, as amended (7 USC 624).

This provision requires or authorizes the President to impose "such fees not in excess of 50 per centum ad valorem or such quantitative limitations" on articles which he determines are being imported "under such conditions and in such quantities" as to render ineffective, or materially interfere with, certain agricultural price support programs, or similar programs designed to protect American agricultural interests.

(f) 50 USC App. 5(b) (Trading With the Enemy Act).

During time of war or other period of declared national emergency, the President is authorized by this provision to regulate imports "by means of instructions, licenses, or otherwise".[48]

(g) 19 USC 1336 (Flexible tariff).

This provision authorizes the President to increase by a maximum of 50 percent the statutory duty rates on any imported article as to which the Tariff Commission (renamed the International Trade Commission in 1975) has found the statutory duty rates fail to equal-

[48] This provision was claimed as authority for the 10 percent import surcharge instituted by President Nixon in August 1971. In *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (1974), the United States Customs Court held the surcharge invalid on the basis that the words "instructions, licenses, or otherwise" define "the nature and mode of the regulatory authorization intended to be delegated to the President," that such delegation was accordingly restrictive in scope and precluded construing the statute as conferring power to regulate foreign commerce by means of supplemental import duties. The United States Court of Customs and Patent Appeals reversed on the grounds that the words "or otherwise" after the phrase "by means of instructions, licenses," should be read expansively in view of the national emergency context of the legislation to mean "by means of any other regulatory device". *United States* v. *Yoshida International, Inc.*, 526 F.2d 560 (1975). In our view, the Appellate Court in *Yoshida* was in error, because the legislative history of the operative provision showed that Congress intended the President to use direct means of control, because by the very nature of war or other national emergency Congress would logically select and authorize the use of direct import controls rather than such indirect controls as duties, and because the application of the *ejusdem generis* doctrine of statutory construction to the phrase "by means of instructions, licenses, or otherwise" would naturally lead to the conclusion that the meaning of the words "or otherwise" is to be taken from the character of the specifically named forms of action preceding it (*i.e.* direct controls).

ize the differences in the cost of production between that article and the equivalent article. This provision does not apply to any article the duty on which has been reduced pursuant to a trade agreement.

The foregoing provisions have a number of important characteristics in common. Each states, with a high degree of specificity, the action or range of actions authorized to be taken under the conditions described. Whenever the imposition of a duty or fee is authorized, it is done so explicitly and made subject to a prescribed numerical limitation, or a limitation precisely determinable in accordance with a statutory formula (*e.g.*, a special dumping duty must be equal to the exact difference between the fair value of imported merchandise and its import sales price; a special countervailing duty must be equal to the exact amount of "bounty or grant" found to exist).[49]

These provisions demonstrate continuous Congressional awareness of its prerogatives, powers, and obligations under the Constitution with respect to laying

[49] An exception to this otherwise uniform approach with respect to limitations on the rate or amount of duty authorized to be imposed can be found in 19 USC 2411. That provision authorizes the President to "impose duties or other import restrictions" on the products of any foreign country which he determines engages in certain condemned practices, including the maintenance of "tariff or other import restrictions," which discriminate against, or unreasonably burden or restrict, United States commerce. The purpose of any action authorized is "to obtain the elimination of" the foreign restrictions or other objectionable practices. In other words, the imposition of a tariff is to be used as leverage to secure removal of the foreign practice. Although no limit is set on the magnitude of the tariff the President can impose, the statute nevertheless makes it clear that the President is authorized to impose a tariff as a means of implementing the legislative purpose.

and collecting taxes, duties, imposts and excises and regulating commerce with foreign nations. Under such circumstances there is no real basis to believe that, absent express statutory language or clear-cut evidence in the legislative history to that effect, Congress intended section 232(b) as a delegation of its Constitutional power to levy import duties or fees, whether for the purpose of raising revenue or for the purpose of regulating foreign commerce. Since the statute does not expressly, or by necessary implication, so provide, and since the legislative history does not demonstrate such an intent, the conclusion seems inescapable that Congress did not intend to give tariff-making powers to the President when it enacted section 232(b).

II

IF SECTION 232(b) DELEGATES TO THE PRESIDENT THE POWER TO DEVISE ANY ACTION HE CHOOSES, IT MUST BE DECLARED INVALID AS AN UNCONSTITUTIONAL ABANDONMENT OF LEGISLATIVE POWER.

Petitioners argue that section 232(b) does not limit the kind of action the President may take under that provision so long as he thinks it would serve to carry out the broad statutory purpose. (Pet. Brief, p. 26). The essence of Petitioners' position is that Congress intended to confer on the President the discretion *to prescribe the form or forms of action to be taken.* We submit that the prescription of remedies or forms of action is a fundamental legislative function which cannot be delegated without contravening the separation of powers principle inherent in the United States Constitution. As stated by the Supreme Court in *Field* v. *Clark,* 143 U.S. 649 (1892):

> "That Congress cannot delegate legislative power to the President is a principle universally rec-

ognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." p. 692.

It has, of course, long been recognized that the delegation of some legislative powers is permissible under the Constitution on the basis of practical necessity. In that connection the Supreme Court, in *Hampton* v. *United States,* 276 U.S. 394 (1928) stated:

> "Congress may feel it is unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive . . . . " p. 406.

The catalogue of cases in which a statute has been challenged as an unconstitutional delegation of legislative power is extensive.[50] The central question in all those cases was whether the statute concerned provided sufficiently comprehensible standards to ensure that the will of Congress would be carried out.[51] As far as we have been able to determine, all those cases involved statutory provisions relating to the execution of the

[50] The United States Court of Customs and Patent Appeals' decision in *Star-Kist Foods, Inc.* v. *United States,* 275 F.2d 472 (1959), examined in some detail the Supreme Court precedents up to that time, especially as they pertained to the tariff and foreign trade laws of the United States.

[51] Statutory delegations have been upheld where, for example, the standard governing the action is "reasonably clear" (*Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 434 (1935)); where the standard "sufficiently marks the field within which the Administrator is to act" (*Yakus* v. *United States,* 321 U.S. 414, 425 (1944)); and where the statute embodies an "intelligible principle" (*Hampton* v. *United States,* 276 U.S. 394, 409 (1928)).

law—*i.e.* when, if, and under what conditions, an action prescribed by Congress may be taken.[52]

The issue in the instant case is entirely different. The question raised is not whether the standards for taking any prescribed action are properly delineated, but *whether the power to prescribe the form of action itself can properly be delegated to the President.* We believe such a delegation cannot be proper under the Constitution, inasmuch as it would mean that the President would have discretion to determine what the law shall be. Judicial validation of that concept would create, we submit, an awesome precedent that would radically change the relationship between Congress and the Executive Branch. It would, in effect, justify the alien proposition that Congress may satisfy its Constitutional obligations by merely identifying problems and directing the Executive Branch to use whatever means it chooses to solve those problems.

III

THE IMPORT LICENSE FEE SYSTEM IS INVALID BECAUSE IT VIOLATES THE UNIFORMITY REQUIREMENT OF ARTICLE I, SECTION 8, CLAUSE 1 OF THE CONSTITUTION.

Article I, Section 8, Clause 1 of the Constitution provides:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and

[52] In the *Star-Kist* case the court cited with approval the test advanced by Judge Ranney of the Supreme Court of Ohio in *Cincinnati, Wilmington, etc. R.R. Co.* v. *Commissioners of Clinton County,* 1 Ohio St. 77, 88, as follows: " 'The true distinction' . . . 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution . . .' ", *Star-Kist, supra,* note 49 at 477.

general Welfare of the United States; but *all Duties, Imposts and Excises shall be uniform throughout the United States.*" (Emphasis added.)

The import license fees, first imposed by Presidential Proclamation 4210 in 1973 and substantially revised by Presidential Proclamation 4341 in 1975, were not, and are not, uniform throughout the United States for purposes of Clause 1 and should, therefore, be declared invalid.

A. THE OIL IMPORT LICENSE FEES ARE DUTIES, IMPOSTS, OR EXCISES WITHIN THE MEANING OF ART. I, SEC. 8, CL. 1.

Under the oil import license fee system no petroleum or petroleum product may be licensed for importation unless the prescribed fees are paid in advance (or a bond posted to secure payment thereof).[53] Such fees, therefore, are charged for the privilege of importing a particular product. Since the fees are assessed at a per barrel rate, they constitute, in effect, import duties as generally understood.[54] Petitioners acknowledge that the import fee has the features of a customs duty "insofar as it is assessed against the importation of goods." (Pet. Brief, p. 19). Similarly, the United States Tariff Commission, in its report, entitled *World Oil Developments and U.S. Import Policies,* concluded that "the license fee has the incidences of a duty" and that the license fee program "is substantively a duty system."[55]

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[53] Sections 1(a) and 3(b)(1), Pres. Proc. 3279, as amended.

[54] Section 3(a)(1)(i), (ii), and—prior to amendment by Pres. Proc. 4412 in January 1976—(iii) of Pres. Proc. 3279, as amended.

[55] T. C. Publication 632 (Washington, D.C., October 1973) at p. 97. Cited by the court of appeals in the instant case (Pet. App., p. 26a, footnote 16).

In *Brown* v. *Maryland,* 12 Wheat. 419 (1827), the Supreme Court held, in an analogous situation, that a license fee enacted by the City of Baltimore on importers who sold imported goods at wholesale violated the Constitution's prohibition against any state-imposed imposts or duties on imports. Art. I, Sec. 10, Cl. 2. Writing for the Court, Chief Justice Marshall reasoned that "a tax on the occupation of an importer is . . . a tax on importation" and had the same effect as "a direct duty on the [imported] article itself." *Id.* at 444. There is no reason to doubt that the terms "imposts" and "duties" as used in Art. I, Sec. 10, Cl. 2 have the same meaning for purposes of the uniformity requirement in Art. I, Sec. 8, Cl. 1.

While we cannot say for sure whether the import license fees are duties or imposts (or possibly excises), we believe they qualify as "imposts" as that term is used in the Constitution.[56] In any case, it is clear that the fees fall into at least one of those categories. As a consequence, the uniformity requirement necessarily applies to such "fees."

B. THE OIL IMPORT LICENSE FEES VARY BY REGION AND ARE, THUS, NOT UNIFORM IN THE CONSTITUTIONAL SENSE.

It is well established that the Clause 1 uniformity requirement refers to geographic uniformity as distin-

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[56] The meaning of the Constitutional terms "duties" and "imposts" was given a detailed review by the Supreme Court in *Michelin Tire Corp.* v. *Wages,* No. 74-1396, — U.S. — (1976). There, the Court indicated that the term "impost" as used at the time of the Constitutional Convention was understood to encompass any charge in the nature of a customs duty with respect to the importation of any article of commerce.

guished from intrinsic uniformity.[57] The oil import license fees here in controversy are not geographically uniform throughout the United States. This is so because the fees vary according to the regional import quota allocations applicable under the preexisting Mandatory Oil Import Quota Program established by Proclamation 3279 in 1959. Since the oil import quota program discriminated by region, fees which are dependent upon such allocations are, likewise, discriminatory on the basis of region.

For purposes of administering the Mandatory Oil Import Quota Program established in 1959 by Proclamation 3279, the United States was divided into two basic geographic regions: Districts I-IV (essentially the states east of the Rocky Mountains)[58] and District V (the western states).[59] These regional designations have remained in effect and are integral to the application of the oil import license fee system here in dispute. Under the license fee system oil imports up to a prescribed level, which is different for each of the

[57] *Fernandez* v. *Weiner*, 326 U.S. 340 (1945). It seems self-evident that whether a duty, impost or excise is imposed for purposes of raising revenue, or for purposes of regulating the foreign commerce of the United States, is immaterial insofar as this uniformity requirement is concerned. It should be noted, however, that when instituted, Pres. Proc. 4341 was expected to generate annual revenue of $4.8 billion, an amount exceeding total import tariff revenues for 1974. See Pet. App. 14a, n. 13.

[58] "[T]he District of Columbia and all of the states of the United States except those states within District V." Section 11(d) of Pres. Proc. 3279, as amended.

[59] "[T]he states of Arizona, Nevada, California, Oregon, Washington, Alaska, and Hawaii." Section 11(e) of Pres. Proc. 3279, as amended.

two main regions, are exempt from the "base" fee.[60] These "fee-exempt" allotments are derived from the regional quotas established under the Mandatory Oil Import Quota Program which the import license fee system replaced. By 1980 the "fee-exempt" allotments are to be reduced to zero in successive annual stages.

Under the import license fee system, in effect through most of 1975, importers of higher grade crude oil, for example, were subject to three different monetary exactions:

(1) a "regular" customs duty of 10.5 cents per barrel,[61]

(2) a "base fee" of 21 cents per barrel, and [62]

(3) a supplemental fee of $2 per barrel ($1 per barrel if imported between February 1 and May 30, 1975).[63]

The $2 supplemental fee was required with respect to every barrel of imported crude oil, whereas the base fee applied only to *some* of those barrels. In addition, the combined fee (base fee and supplemental fee) otherwise chargeable on any barrel of imported crude oil was reduced by the applicable amount of customs duty. Thus, the total exaction on each barrel of im-

[60] The exempt quantities are prescribed in sections 2 and 8 of Pres. Proc. 3279, as amended by Pres. Proc. 4210 (38 Fed. Reg. 9645). Section 3(a)(1)(ii) imposes the base fees on imports "over and above the levels of imports established in Section 2."

[61] Item 475.10 (column 1), Tariff Schedules of the United States, 19 U.S.C. 1202.

[62] Section 3(a)(1)(i), Pres. Proc. 3279, as amended.

[63] Section 3(a)(1)(iii), Pres. Proc. 3279, as amended.

ported higher grade crude oil was either $2.21[64] or $2.00[65] depending on whether the base fee exemptions applied. Since the base fee exemption was allocated on a purely regional basis, and since there was a substantial disparity in the amount of those allocations (as between Districts I-IV on the one hand, and District V on the other), it necessarily follows that the import fees were discriminatory on a geographical basis in violation of the uniformity requirement of Article I, Section 8, Clause 1 of the Constitution.

To illustrate the non-uniform operation of the fee/duty system, consider that for the month of September 1975, the fee-exempt crude oil allocation was 1,593,600 barrels per day for Districts I-IV and 536,000 barrels for District V.[66] During the same month the average crude oil imports amounted to 3,262,533 barrels per day for Districts I-IV, and 684,133 barrels per day for District V.[67] This means that the first 536,000 daily

[64] 10.5 cents regular duty, plus 21 cents base fee, plus $2.00 supplemental fee, less credit for duty of 10.5 cents, totalling $2.21.

[65] 10.5 cents regular duty, plus $2.00 supplemental fee, less credit for duty of 10.5 cents, totalling $2.00.

[66] Districts I-IV were permitted to import 1,992,000 "average barrels per day per year" from non-Canadian, non-Mexican sources (section 2(a)(1) of Pres. Proc. 3279, as amended), reduced by 20 percent (section 8 of Pres. Proc. 3279, as amended), or 1,593,600 barrels. Separate fee-exempt allocations for imports from Canada and Mexico were prescribed by section 2 of the Proclamation, but these provisions do not affect the validity of the basic argument made herein. The Canadian and Mexican allocations and imports have been excluded only in order to simplify the computations and general discussion.

[67] Actual daily imports derived by subtracting from total actual monthly imports all imports from Canada and Mexico and dividing resultant figures by the number of days in the month. Actual

barrels of crude oil imported into the western states and the first 536,000 daily barrels imported into the eastern states were exempt from a base fee. The next 148,133 daily barrels imported into the western states, however, were subject to the maximum charge of $2.21 per barrel, while only $2.00 per barrel was paid with respect to the same amount of daily barrels imported into the eastern or Gulf coast states.

The rate differential described above, excluding the reduction for regular duties,[68] can be seen from the following table:

RATES ON CRUDE OIL IMPORTS—SEPTEMBER 1975
(Without Reduction for Customs Duty)

Districts	First 536,000 Barrels/day	Barrels in Excess of 536,000 Barrels/Day	Barrels in Excess of 1,593,600 Barrels/Day
I-IV	$2.00	*$2.00**	$2.21
V	$2.00	*$2.21*	$2.21

* Up to 1,539,600 barrels/day.

This constitutional defect in the import license fee system was raised by the United States Tariff Commission in its October 1973 report on oil import policy to the Senate Finance Committee. In describing the import license fee system established by President Nixon earlier that year, the Commission observed:

> "What was permissible under a quota system may be unacceptable under a duty program. Given a

monthly imports taken from import statistics published in the "Crude Petroleum, Petroleum Products, and Natural Gas Liquids" mineral industry survey for September 1975 prepared January 29, 1976, by the Division of Fuels Data, Bureau of Mines, U.S. Department of the Interior, pages 16 and 17, Table 14.

[68] Since the customs duty is collected in all events, but also is credited against applicable duties, the fee rates shown in the table also equal the total exactions per barrel for the same quantities of imports.

duty system existing now and not held in abeyance until 1980 when the fee-free aspects are phased out, Proclamation 4210 must satisfy the uniformity requirement for duties from the date of its promulgation. The continuing variation in allocations resembles, under the duty program, an exemption on an unequal basis from the duty, suggesting non-uniformity in the application of the duty. An importer on the east coast will be paying a license fee on the first barrel of oil after his free allocation has been expended, while an identical importer on the west coast may be paying a zero duty on the equivalent barrel because his allocation was larger (the result of a larger total pool in his district to share in). *This violates the requirement of geographic uniformity, because the result is different duties in two ports on the same item, the item being the xth barrel of oil.* The license-fee system in its final form (1980) avoids this difficulty. The question of the propriety of fee-free allocations remains, however, until such system is completely phased out." (Emphasis added).[69]

CONCLUSION

For the reasons set forth above the judgments of the court of appeals should be sustained.

Respectfully submitted.

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[69] *Supra*, note 55 at pp. 98-99.

Certificate of Service

I hereby certify that three copies of the foregoing Brief of *Amicus Curiae* were, this 17th day of March 1976, mailed, first class postage prepaid, to the following counsel of record:

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